Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

AURELIO BENAVIDES, M.D.,

Petitioner,

v.

KENT A. GERVER and BILLIE JO GERVER,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether a state appellate court violates the Due Process Clause by refusing to state any basis for its exercise of subject matter jurisdiction despite a direct challenge to, and the apparent absence in the record of any basis for, the exercise of such jurisdiction.

Whether a state appellate court violates the Due Process Clause by reversing an order granting a new trial, where the order was based upon a finding of misrepresentation predicated upon the trial court's comparison of its personal observations of the plaintiff's trial demeanor with the plaintiff's demeanor on a post-trial surveillance videotape, insofar as the state appellate court lacks any evidentiary basis for making such comparison.

LIST OF PARTIES

The Petitioner in this case is Aurelio Benavides, M.D. The Respondents in this case are Kent A. Gerver and Billie Jo Gerver. All parties are individuals.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Aurelio Benavides, M.D., respectfully petitions this Court for the issuance of a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Appeals of West Virginia is reported at 1999 WL 1188900 (W. Va. Dec. 13, 1999), and is reprinted *infra* at Appendix pp. 1-26. The Order of the Supreme Court of Appeals of West Virginia denying rehearing is not reported, but is reprinted *infra* at Appendix p. 42. The Order of the Supreme Court of Appeals of West Virginia staying the issuance of its Mandate and refusing the Respondents' request for posting of an appeal bond is not reported, but is reprinted *infra* at Appendix pp. 40-41.

The June 22, 1998, Order of the Circuit Court of Berkeley County, West Virginia granting Petitioner's motion for a new trial is not reported, but is reprinted *infra* at Appendix pp. 27-35. The September 16, 1998, Order of the Circuit Court of Berkeley County, West Virginia, denying Respondents' motion to alter or amend the judgment is not reported, but is reprinted *infra* at Appendix pp. 36-37. The December 28, 1998, Order of the Circuit Court of Berkeley County, West Virginia denying Respondents' second motion to alter or amend the judgment is not reported, but is reprinted *infra* at Appendix pp. 38-39.

JURISDICTION

The opinion of the Supreme Court of Appeals of West Virginia reversing the trial court's grant of a new trial was entered on December 13, 1999. A timely Petition For

Rehearing was denied by the Supreme Court of Appeals of West Virginia on January 26, 2000. This Petition For Writ Of Certiorari is filed within 90 days thereof. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST., amend. XIV, § 1, provides that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

W. VA. CODE § 58-5-1 (Michie Supp. 1999) (effective Jun. 12, 1998), provides, in relevant part, that:

> A party to a civil action may appeal to the supreme court of appeals from a final judgment of any circuit court or from an order of any circuit court constituting a final judgment . . .

Former W. VA. CODE § 58-5-1(i) (Michie 1997) (amended by 1998 W. VA. ACTS c. 110), provided, in relevant part, that:

> A party to a controversy in any circuit court may obtain from the supreme court of appeals . . . an appeal from . . . (i) In any civil case where there is an order granting a new trial . . . and in such cases an appeal may be taken from the order without waiting for the new trial . . . to be had . . .

STATEMENT OF THE CASE

Petitioner Aurelio Benavides, M.D., is a urologist practicing in West Virginia. Respondent Kent Gerver is a former patient of Dr. Benavides. Respondent Billie Jo Gerver is Kent Gerver's wife. Respondents sued Dr. Benavides in the Circuit Court of Berkeley County, West Virginia, alleging medical malpractice and loss of consortium related to Dr. Benavides' performance of a routine vasectomy on Kent Gerver. Although, after the vasectomy, Kent Gerver eventually underwent a procedure known as "de-nervation of the spermatic cord" – in layman's terms the severance of the nerves to the scrotal area – he nonetheless rested his case against Dr. Benavides on subjective descriptions of intense, chronic, and debilitating pain in his groin. Following trial, the jury returned a verdict of more than $2.1 million in favor of Respondents.

The post-trial publicity surrounding Mr. Gerver's award did not inure to his benefit. Rather, upon learning of the verdict, a number of Mr. Gerver's fellow citizens came forward to report that, contrary to his tearful testimony, Mr. Gerver in fact led an active, apparently pain-free life. Upon verifying that information through post-trial video surveillance, Dr. Benavides filed a timely motion for relief from the judgment pursuant to W. Va. R. Civ. P. 60(b)(3), alleging that it had been procured by fraud and misrepresentation. Dr. Benavides supported his motion with a surveillance videotape recording that showed Mr. Gerver "performing a number of normal life activities (weed-wacking, lawn-mowing, attending sporting events, carrying objects, climbing bleachers and having an elementary-school-age child sit on his lap) all without any apparent restrictions, pain or discomfort." (App. at 34.)

By Order dated June 22, 1998, the trial court (*Sanders, J.*) granted Dr. Benavides' motion for relief from the judgment, and awarded a new trial. (App. at 27-35.) The trial court made an express finding of "misrepresentation" by Mr. Gerver, based on the trial court's personal observations of Mr. Gerver's trial demeanor. (*Id.* at 34.) The trial court compared its own observation of Mr. Gerver at trial – a man who "moved about the courtroom gingerly, projecting very obvious discomfort and pain," and who "unsuccessfully fought back tears as he described the devastation this pain had wreaked upon his life, his family, his relationship with his wife" – with the Mr. Gerver who appeared on the videotape. In the trial court's estimation, a Jekyll and Hyde transformation had occurred. "The person depicted in the video and the person that Plaintiff [Mr. Gerver] represented himself to be, through his words and actions before the jury, are two different persons." (*Id.*) Because "[e]very bit of evidence relating to liability and damages depend[ed] upon the Plaintiff's subjective description of his pain," rendering Mr. Gerver's credibility "the absolute linchpin" of Respondents' case, the trial court concluded that a new trial must be awarded to prevent a "miscarriage of justice." (*Id.* at 31.)

By Order dated September 16, 1998, the trial court denied Respondents' motion to alter or amend the "judgment," filed pursuant to W. Va. R. Civ. P. 59(e). (App. at 36-37.) On September 28, 1998, Respondents filed a second motion to alter or amend the judgment pursuant to W. Va. R. Civ. P. 59(e). By Order dated December 28, 1998, the trial court also denied that motion, noting among other things that it was untimely. (*Id.* at 38-39.)

Respondents did not file a timely petition for appeal within four months (the statutory appeal period) of either the June 22, 1998, or September 16, 1998, Orders. *See* W.

VA. CODE § 58-5-4 (Michie Supp. 1999). In fact, the Respondents did not file their petition for appeal until April 27, 1999. Moreover, the Order they sought to appeal – the June 22, 1998, Order granting a new trial – was not an immediately appealable order within the subject matter jurisdiction of the Supreme Court of Appeals of West Virginia. Although, at one time, the West Virginia Legislature had expressly included an order granting a new trial as one immediately appealable to the Supreme Court of Appeals of West Virginia,[1] in 1998 W. VA. ACTS c. 110, the Legislature amended W. VA. CODE § 58-5-1 to remove orders granting new trials from the class of orders that were immediately appealable. The amendment was effective prior to the trial court's June 22, 1998, Order, as well as the subsequent September 16, 1998, and December 28, 1998, Orders denying the Respondents' first and second motions to alter or amend.

Dr. Benavides repeatedly brought the issue of lack of subject matter jurisdiction to the attention of the Supreme Court of Appeals of West Virginia. He raised the issue first in a motion to dismiss, and then again in the Brief of Appellee. (*See* App. at 70-78, 92-97.) Indeed, much of the oral argument was devoted to the question of the subject matter jurisdiction of the Supreme Court of Appeals of West Virginia to decide the appeal.[2]

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[1] The Supreme Court of Appeals of West Virginia is West Virginia's appellate court of last resort. There is no intermediate appellate court in the State of West Virginia.

[2] The Supreme Court of Appeals of West Virginia denied Petitioner's motion to dismiss without explanation, consistent with its practice of considering jurisdictional issues together with the merits in certain cases. (App. at 98.) *See, e.g., West Virginia Dept. of Energy v. Hobet Min. & Constr. Co.*, 178 W. Va. 262, 263, 358 S.E.2d 823, 824 (1987) (ultimately dismissing appeal for lack of jurisdiction, but noting that "[o]ver [the

On December 13, 1999, the Supreme Court of Appeals issued a *per curiam* opinion reversing the trial court's Order granting a new trial, and directing the entry of judgment in favor of Respondents. (App. at 1-17.) Nowhere in the opinion, however, was there a single reference to the subject matter jurisdiction of the Supreme Court of Appeals of West Virginia to review either (1) an interlocutory order granting a new trial, or (2) a petition for appeal filed outside the four-month appeal period. Presented for the first time with the refusal of the Supreme Court of Appeals of West Virginia to state the basis for its own subject matter jurisdiction – if indeed it could be said to exist – Petitioner raised the court's violation of his federal due process rights in a timely Petition For Rehearing. (*See* App. at 43-66.) Specifically, the Petition for Rehearing stated as follows:

> Where a litigant challenges subject matter jurisdiction, it is an essential element of due process that the tribunal state the basis of its subject matter jurisdiction.
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> * * *
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> THIS COURT'S OPINION, RENDERED WITHOUT SUBJECT MATTER JURISDICTION, VIOLATES DR. BENAVIDES' DUE PROCESS

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appellee's] objection and formal motion to dismiss, this Court permitted the [appellant] to pursue the appeal and entered an order granting the petition [for appeal]. This was done so that the entire case could be evaluated and we could hear full arguments"). Similarly, the Supreme Court of Appeals does not record oral arguments, and thus, no transcript of the hearing is available. Petitioner's Counsel of Record, who argued the case below, represents to this Court that a substantial portion of the oral argument before the Supreme Court of Appeals of West Virginia was devoted to that court's subject matter jurisdiction to hear the appeal.

> RIGHTS UNDER THE FEDERAL AND STATE CONSTITUTION.
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> * * *
>
> Consequently, this Court was without jurisdiction to entertain the Gervers' appeal and, in doing so, violated the appellee's federal and state due process rights.
>
> * * *
>
> . . . [D]ue process requires a "fair hearing before an impartial court or other tribunal ***having jurisdiction of the cause.***" 16B Am.Jur.2d *Constitutional Law* § 966 (1988) (emphasis added) (footnotes omitted). Thus, "[u]nless jurisdiction exists, the judgment rendered is not by due process of law, and is ineffectual for any purpose; no rights are in any way affected by it, from it no rights can be derived, and all proceedings founded thereon are void and are not entitled to any respect in any other tribunal." *Id.* Accordingly, the Court erred by failing to state the basis for its jurisdiction.
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> * * *
>
> As this Court rendered a decision without subject matter jurisdiction, the appellee's federal and state constitutional due process rights have been violated.

(App. at 44, 50, 53, 56, 64.) By Order dated January 26, 2000, however, the Supreme Court of Appeals of West Virginia denied the Petition For Rehearing by a vote of 3-2 (Justices Maynard and Scott voting to grant), without explanation and again without reference to the court's subject matter jurisdiction. (*Id.* at 42.)

The *per curiam* opinion issued by the Supreme Court of Appeals of West Virginia also presented Petitioner for the first time with the court's departure from its prior holdings that an appellate court lacks the ability to

review trial court findings regarding witness credibility and demeanor. The majority opinion reversed the trial court's Order on the basis that the videotape recording, showing Mr. Gerver performing normal lifestyle activities in no apparent pain, did not contradict "the plaintiffs' *testimony* regarding the inception and duration of his pain, and the debilitating effect of that pain on his life." (App. at 9-10 (emphasis added).) As Justice Maynard pointed out in dissent, however, the trial court based its Order on firsthand observation of Mr. Gerver's *demeanor* at trial, whereas the majority "did not see [Mr. Gerver's] demeanor at trial." (*Id.* at 19.) As Justice Maynard then concluded, "there is absolutely no sound legal reason for th[e Supreme Court of Appeals] to second-guess the determination of the trial court. . . . " (*Id.*)

In the Petition for Rehearing, Petitioner therefore argued that the majority's usurpation of the trial court's credibility determination constituted a denial of his federal due process rights. Specifically, the Petition for Rehearing stated as follows:

> The trial judge's award of a new trial in this case was predicated upon his personal observations of the appellant, Kent Gerver's trial demeanor when contrasted to a post-trial surveillance videotape. Although this Court is obviously competent to view the videotape and make its own conclusions regarding Gerver's degree of observable impairment, it could not make any conclusions regarding the Gerver's [sic] trial demeanor. Where an appellate court lacks an objective basis for the reversal of a trial court's award of a new trial predicated upon the trial judge's personal observations of a litigant's trial demeanor, the appellee asserts that such reversal constitutes a denial of due process.

(App. at 46; *see also id. at* 57, 59-60.) The January 26, 2000, Order denying Dr. Benavides' Petition For Rehearing also failed to address this issue. (*Id.* at 42.)

REASONS FOR GRANTING THE WRIT

The Supreme Court of Appeals of West Virginia (the "West Virginia Court") committed two errors of constitutional magnitude in rendering its decision in this matter, both of which present important questions of first impression that should be directly addressed by this Court.

First, the West Virginia Court refused to state any basis for its exercise of subject matter jurisdiction despite a direct challenge to, and the apparent absence in the record of, any basis for subject matter jurisdiction. Due process dictates that any tribunal adjudicating a matter must have jurisdiction, both personal and subject matter, of the cause. Petitioner respectfully submits that where there is a direct challenge to, and the apparent absence of, subject matter jurisdiction in a state court of last resort, due process likewise dictates that the court must, at a minimum, state the basis for its exercise of subject matter jurisdiction. *See International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380 (1986) (requiring a state court to consider and resolve challenges to its subject matter jurisdiction).[3] Otherwise, in cases where the existence of

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[3] The West Virginia Court's apparent presumption of subject matter jurisdiction further raises the important federal question as to whether this Court's decisions in *Steel Co. v. Citizens For A Better Environment*, 523 U.S. 83 (1998), *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), and *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 384 (1884), which together require subject matter jurisdiction to

subject matter jurisdiction did not appear in the record, suggesting the absence of an essential component of due process, state courts of last resort could avoid this Court's review merely by declining to articulate the basis of their subject matter jurisdiction.

Second, the West Virginia Court reversed the trial court's order granting a new trial – which was expressly based on the trial court's comparison of its personal observations of the plaintiff's demeanor at trial and his appearance on a post-trial surveillance videotape – despite the absence of any evidentiary basis to dispute the trial court's assessment of the plaintiff's trial demeanor. Due process also requires that there must be some evidence in the record to support a court's decision. Petitioner respectfully submits that where, as here, there is and can be no evidentiary basis for rejecting a trial court's determination of witness credibility, *i.e.*, because that determination was based upon the trial court's comparison of its own observation of the witness' trial demeanor and his subsequent appearance on a post-trial surveillance videotape, the right to due process has been violated, and the trial court's findings must be reinstated. *See Schware v. Board of Bar Examiners of State of N.M.*, 353 U.S. 232 (1957).

As both errors violated the Due Process Clause, and present apparent issues of first impression, the Petitioner firmly believes that the award of a writ of certiorari in this case is appropriate.

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be apparent in the record of federal courts, and prohibit federal courts from assuming that subject matter jurisdiction exists in order to reach the merits, should apply equally to state courts on federal due process grounds.

I. THE WEST VIRGINIA COURT'S APPARENT PRESUMPTION OF JURISDICTION PRESENTS AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT, NAMELY WHETHER A STATE COURT VIOLATES THE DUE PROCESS CLAUSE BY REFUSING TO ARTICULATE THE BASIS FOR ITS EXERCISE OF SUBJECT MATTER JURISDICTION WHEN CHALLENGED AND WHERE THE EXISTENCE OF JURISDICTION DOES NOT APPEAR IN THE RECORD.

The Fourteenth Amendment to the United States Constitution prohibits the States from depriving any person "of life, liberty or property, without due process of law." U.S. CONST., amend. XIV, § 1. Due process requires that a court have not only personal jurisdiction over the parties, but also subject matter jurisdiction to decide the case. *See Scott v. McNeal*, 154 U.S. 34, 46 (1894) ("No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party."); *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (due process requires "a tribunal competent by its constitution – that is, by the law of its creation – to pass upon the subject-matter of the suit"), *overruled in part on other grounds by Shaffer v. Heitner*, 433 U.S. 186 (1977). Moreover, subject matter jurisdiction is of such fundamental importance that, unlike personal jurisdiction, objections thereto cannot be waived, nor can it be conferred on a court by agreement of the parties. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Rather, courts have an unflagging obligation to examine the basis for their own jurisdiction whenever it appears that subject matter jurisdiction may be lacking. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-84 (1999) (addressing subject matter jurisdiction of federal courts, and concluding that "[f]or a court to pronounce

upon [the merits] when it has no jurisdiction to do so . . . is . . . for a court to act ultra vires. . . . Accordingly, *subject-matter delineations must be policed by the courts* on their own initiative even at the highest level.") (citations and internal quotations omitted); *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. at 393 (where preemption claim was "a claim that the state court ha[d] no power to adjudicate the subject matter of the case," it had to be "considered and resolved by the state court").[4]

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[4] The obligation to determine the existence of subject matter jurisdiction extends not only to the jurisdiction of the reviewing court, such as this Court, but also to the jurisdiction of the court from which review is taken, such as the West Virginia Court. *See, e.g., Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 540 (1986) (noting "special obligation" of all federal appellate courts to "satisfy [themselves] not only of [their] own jurisdiction, *but also that of the lower courts in a cause under review*," even though the parties are prepared to concede it. . . . And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits *but merely for the purpose of correcting the error of the lower court in entertaining the suit.*") (citations and footnotes omitted) (emphasis supplied); *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900) ("On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested. . . . ") Although the analysis in those cases dealt with the Article III jurisdiction of the federal courts, Petitioner respectfully submits that the same analysis should obtain with respect to state court judgments. The absence of subject matter jurisdiction in a state appellate court also is of constitutional import, albeit under the Due Process Clause.

Given the fundamental importance of subject matter jurisdiction, this Court has not hesitated to examine, and subsequently vacate, a state court decision upon finding that the court lacked subject matter jurisdiction to render the decision. *See, e.g., Scott v. McNeal*, 154 U.S. at 48-50 (setting aside state court judgment as violative of due process upon determining that, *inter alia*, state probate court lacked subject matter jurisdiction under applicable state law). Moreover, in the context of the lower federal courts, this Court has held that if a basis for exercising subject matter jurisdiction does not appear in the record, the judgment must be vacated for want of jurisdiction – even if none of the parties raises the issue. *Mansfield, C & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 384 (1884). Similarly, this Court has ruled that federal courts may not "presume" the existence of subject matter jurisdiction in order to reach the merits, even if the merits question is more easily resolved, and the prevailing party would be the same. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93 (1998). In an earlier decision, this Court also suggested that presuming subject matter jurisdiction would violate due process. *See Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 702-05.

In this case, each of these doctrines comes into play in the context of a state court judgment. Although Petitioner repeatedly challenged the West Virginia Court's exercise of subject matter jurisdiction, effectively asserting that it was acting *ultra vires*, that court completely ignored this "threshhold" matter, and apparently presumed, *sub silentio*, the existence of jurisdiction in order to reach the merits. The West Virginia Court's refusal to provide any affirmative statement of the basis for its own jurisdiction is constitutionally troublesome because, as described more fully below, the record reveals its complete lack of subject matter jurisdiction to decide the

appeal. In these circumstances, where Petitioner presented a direct, timely, and well-founded challenge to subject matter jurisdiction, and the existence of subject matter jurisdiction did not appear in the record, Petitioner respectfully submits that the Due Process Clause required the West Virginia Court to make an affirmative statement of the basis for exercising subject matter jurisdiction.

A. No Basis For The West Virginia Court's Exercise Of Subject Matter Jurisdiction Appears In The Record.

As Petitioner argued below, the record revealed that the West Virginia Court lacked subject matter jurisdiction to review the trial court's order granting a new trial. The West Virginia Court has acknowledged that it is a court of "limited appellate jurisdiction," whose jurisdictional authority extends only to the extent endowed by the West Virginia Constitution or conferred by the West Virginia Legislature. Syl. pt. 1, *James M.B. v. Carolyn M.*, 193 W. Va. 289, 456 S.E.2d 16 (1995). The West Virginia Court therefore has recognized that, as a court of limited appellate jurisdiction, it "is obliged to examine its own power to hear a particular case," and that it "has a responsibility *sua sponte* to examine the basis of its own jurisdiction." *Id.* Had the West Virginia Court done so in this case, Petitioner believes that it would have been constrained to find that it lacked jurisdiction to entertain either (1) an appeal from an interlocutory order granting a new trial, or (2) a petition for appeal filed well outside the four-month statutory appeal period, and therefore would have dismissed the appeal as improvidently granted.[5]

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[5] The West Virginia Court previously has dismissed appeals as improvidently awarded where, upon examination of

Prior to entry of the order awarding a new trial to Petitioner in this case, the West Virginia Legislature had conferred jurisdiction on the West Virginia Court to review "final judgment[s], order[s] or decree[s]," and in addition, had expressly provided for a right of immediate appeal of orders granting a "new trial." W. VA. CODE

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its own subject matter jurisdiction, it determined that jurisdiction did not exist. *See, e.g., Cronin v. Bartlett*, 196 W. Va. 324, 326, 472 S.E.2d 409, 411 (1996) (dismissing appeal as improvidently awarded upon determining that the petition for appeal had been filed eight days after expiration of the four-month appeal period, and noting that appellants' assertion that "the miscalculation of the appeal period was insubstantial [wa]s without merit," insofar as the West Virginia Court had "a responsibility to examine the basis of its own jurisdiction. Syl. pt. 1, *McCormick v. Allstate Insurance Company*, 194 W. Va. 82, 459 S.E.2d 359 (1995); syl. pt. 1, *Coleman v. Sopher*, 194 W. Va. 90, 459 S.E.2d 367 (1995). *See also* syl. pt. 2, *State ex rel. Davis v. Boles*, 151 W. Va. 221, 151 S.E.2d 110 (1966), indicating that the appeal period is jurisdictional."). In conjunction with the fact that the refusal to provide an affirmative explanation of the basis for jurisdiction occurred for the first time when the West Virginia Court issued its opinion, the court's unanticipated departure from previous authority regarding both the obligation to examine its own jurisdiction and the limits on its ability to review non-final orders, *see infra* in text, demonstrates that Petitioner sufficiently preserved the federal constitutional issue by raising it in his Petition For Rehearing. *See Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-67 (1932); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917). Moreover, even if that were not the case, because the West Virginia Court does not preclude consideration of issues raised for the first time in a petition for rehearing, the issue also otherwise has been timely preserved. *See, e.g., Armstrong v. Ross*, 56 W. Va. 16, 48 S.E. 745 (1904) (dismissing order as nonappealable even though question of appealability was raised for the first time on petition for rehearing); *see also Hathorn v. Lovorn*, 457 U.S. 255, 262-64 (1982).

§ 58-5-1(i) (Michie 1997) (amended by 1998 W. Va. Acts c. 110). Accordingly, prior to entry of the new trial order in the instant case, interlocutory orders awarding new trials were appealable under the West Virginia statute. The West Virginia Court had previously acknowledged that new trial orders did not constitute "final judgments" and that, were it not for the special provision in W. Va. Code § 58-5-1(i) permitting an immediate appeal of new trial orders, the court would not have subject matter jurisdiction over the appeal of such orders. *Coleman v. Sopher*, 194 W. Va. 90, 94-95, 459 S.E.2d 367, 371-72 (1995).[6]

In early 1998, however, prior to entry of the new trial order, the West Virginia Legislature amended the jurisdictional statute, condensing it into a single paragraph that limited the West Virginia Court's appellate jurisdiction, in

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[6] *See also Gonzalez v. Conley*, 199 W. Va. 288, 292, 484 S.E.2d 171, 175 (1997) ("when a trial judge vacates a jury verdict and grants a new trial, he or she does not enter a final judgment"); *Delardas v. Morgantown Water Comm'n*, 148 W. Va. 318, 322, 134 S.E.2d 889, 891 (1964) (noting that court lacked jurisdiction to determine merits of order that sustained demurrer, but did not dismiss action, since it was "an interlocutory order not made appealable by statute," and further noting that former § 58-5-1 made appealable "such interlocutory orders as those which quash an attachment or grant a new trial"). This Court has ruled similarly in interpreting 28 U.S.C. § 1291. *See, e.g., Firestone Tire & Rubber Company v. Risjord*, 449 U.S. 368, 373-74, 379 (1981) (noting that because the jurisdiction of federal courts of appeals under § 1291 was limited to "appeals from all final decisions of the district courts," appeal could not be taken under that section "until there has been a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment"; consequently, court of appeals lacked jurisdiction to review non-final order denying motion for disqualification of counsel, and was "without authority to decide the merits.") (citations, internal quotations, and footnote omitted).

pertinent part, to reviewing "a final judgment of any circuit court." W. VA. CODE § 58-5-1 (Michie 1999). Notably, the West Virginia Legislature deleted the portion of the former statute, subsection (i), that had expressly permitted an immediate appeal of interlocutory orders awarding a new trial. Moreover, the amended statute became effective 90 days after its passage on March 14, 1998, or on June 12, 1998 – ten (10) days prior to the trial court's June 22, 1998, Order granting Petitioner a new trial. *See* W. VA. ACTS c. 110; *see also Coonrod v. Clark*, 189 W. Va. 669, 672 n.7, 434 S.E.2d 29, 32 n.7 (1993) (version of statute in effect on date of judgment, rather than version in effect on date case was filed, governed time period for appeal). Thus, on the basis of the existing record available for this Court's review, the West Virginia Court lacked subject matter jurisdiction to review the trial court's interlocutory order until after the new trial concluded and a final judgment had been rendered.[7] *See also*

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[7] Moreover, even had appeal been permissible, the record revealed that Respondents' petition for appeal was not timely filed. Even assuming, *arguendo*, that the trial court's June 22, 1998, Order was a "final judgment," Respondents did not file their petition for appeal within the statutory appeal period of four months of the entry of that order, nor within four months of the entry of the trial court's September 16, 1998, Order denying their motion to alter or amend the "judgment," as required by W. Va. Code § 58-5-4. Rather, the Respondents filed a second motion to alter or amend the "judgment" – a practice not recognized by the West Virginia Rules of Civil Procedure, and one that does not toll the time limits for filing a petition for appeal – and then filed a petition for appeal on April 27, 1999, after the trial court denied that second motion. *See* Syl. pt. 7, *James M.B. v. Carolyn M., supra* ("A motion for reconsideration filed [pursuant to R. Civ. P. 59(e)] within ten days of judgment being entered suspends the finality of the judgment and makes the judgment unripe for appeal. When the time for appeal is so extended, its full length begins to run from the date of entry of

Ginsberg v. Williams, 135 N.W.2d 213, 217-18 (Minn. 1965) (concluding that, based on Minnesota Legislature's deletion of "catch all" statute permitting immediate appeal of order granting new trial, "the statutory right to appeal" such orders no longer existed; because order at issue had been entered after effective date of revision to statute, order was nonappealable).

B. Due Process Required The West Virginia Court To Articulate The Basis For Its Exercise Of Subject Matter Jurisdiction.

Faced with Petitioner's repeated challenges to its subject matter jurisdiction, as well as the absence of evidence in the record to demonstrate such jurisdiction, the West Virginia Court was obliged to make an affirmative pronouncement of the basis for its subject matter jurisdiction to decide Respondents' appeal.[8] It did not do so, however, but instead appears, at best, to have assumed

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the order disposing of the motion.") As the petition for appeal was not filed within, at minimum, four months of the entry of the order disposing of the initial Rule 59(e) motion, it should have been determined by the West Virginia Court to be untimely. *See Cronin, supra* n.5.

[8] Even this Court, with respect to its own subject matter jurisdiction, has noted, "a review of the sources of the Court's jurisdiction is a threshold inquiry appropriate to the disposition of every case that comes before us." *Brown Shoe Co. v. United States*, 370 U.S. 294, 305-06 (1962). Moreover, where this Court has determined that the judgment being reviewed lacked the requisite finality, it has dismissed appeals for want of subject matter jurisdiction. *Collins v. Miller*, 252 U.S. 364, 371 (1920). Likewise, in Petitioner's view, had the West Virginia Court examined any potential basis for the exercise of its subject matter appellate jurisdiction, it would have determined that the new trial order lacked the requisite finality required under the amended appeal statute.

that appellate jurisdiction existed. Such a *sub silentio* assumption comports neither with decisions of this Court that have required an affirmative resolution of the jurisdictional question before proceeding to the merits, nor with due process.

First, the West Virginia Court's action conflicts with this Court's decision in *International Longshoremen's Ass'n, AFL-CIO v. Davis, supra*. In that case, a state trial court was presented with a challenge to its subject matter jurisdiction, based on federal preemption, in a motion for judgment notwithstanding the verdict. It denied the motion without explanation. On appeal, the state supreme court found that the defense had been waived. *Id.* at 386-87. Although this Court affirmed on the merits, it found that the state supreme court had erred in avoiding the issue of subject matter jurisdiction by finding that the preemption claim had been waived. "A claim of Garmon pre-emption is a claim that the state court has no power to adjudicate the subject matter of the case, and when a claim of Garmon pre-emption is raised, *it must be considered and resolved by the state court.*" 476 U.S. at 393 (emphasis added); *see also id.* at 388 (whether Congress exercised its preemptive powers over state court subject matter jurisdiction "in a specific case is the question *that must be answered* when a party claims that a state court's jurisdiction is pre-empted") (emphasis added).

The same reasoning applies here, even though the narrow issue – due process rather than preemption – is different. Just as in *Davis*, Petitioner claimed that the West Virginia Court had "no power to adjudicate the subject matter of the case." 476 U.S. at 393. And just as in *Davis*, the West Virginia Court avoided the issue of subject matter jurisdiction by refusing to address it when raised by Petitioner. Consequently, just as in *Davis*, the West Virginia Court erred by refusing to "consider[ ] *and*

resolve[ ]" the issue, insofar as a due process violation will result from a decision rendered by a court lacking subject matter jurisdiction. *Id.* (emphasis added).

Second, this Court has prohibited the federal courts from indulging in presumptions of jurisdiction based on other provisions in the United States Constitution, but has not directly addressed the important federal question whether the Due Process Clause imposes the same prohibition on state courts. For example, in the context of the lower federal courts, this Court long ago concluded that the absence of record evidence to support a finding of jurisdiction was dispositive:

> The true question is not what either of the parties may be allowed to do, but whether this court will affirm or reverse a judgment of the circuit court on the merits, when it appears on the record, by a plea to the jurisdiction, that it is a case to which the judicial power of the United States does not extend. The course of the court is, when no motion is made by either party, on its own motion, to reverse such a judgment for want of jurisdiction, not only in cases where it is shown, negatively, by a plea to the jurisdiction, that jurisdiction does not exist, *but even when it does not appear, affirmatively, that it does exist.*

Mansfield, C. & L.M. Ry. Co. v. Swan, 111 U.S. 379, 384 (1884) (emphasis added).[9] That conclusion should be equally applicable, on due process grounds, to a state

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[9] *See also* Syl. pt. 5, *Dixon v. Hesper Coal & Coke Co.*, 100 W. Va. 422, 130 S.E. 633 (1925) ("The jurisdiction of the court, whether over the person or the subject-matter, must affirmatively appear from the record."), *overruled in part on other grounds by Galloway v. Cinello*, 188 W. Va. 266, 423 S.E.2d 875 (1992); *Fulton v. Ramsey*, 67 W. Va. 321, 326, 68 S.E. 381, 382 (1910) ("the establishment of the jurisdiction of a court, whether over the person or the subject matter, must be affirmatively shown by the record.") (citation omitted).

court such as the West Virginia Court, which is, like the federal courts, a court of limited jurisdiction. *See* Syl. pt. 1, *James M.B. v. Carolyn M., supra.*

Moreover, the requirement that the record establish a basis for exercising jurisdiction is consistent with the fundamental importance accorded to subject matter jurisdiction, an issue so important that it cannot be waived, and to which principles of estoppel do not apply. *See Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 702. Indeed, this Court has ruled on Article III grounds that federal courts may not "presume" the existence of subject matter jurisdiction in order to reach the merits, even if the merits question is more easily resolved, and the prevailing party would be the same. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). Although Article III does not apply to state courts, this Court has suggested that presuming subject matter jurisdiction would result in a violation of due process – a conclusion that *would* apply equally to state and federal courts. *See Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 703-05 (contrasting personal jurisdiction and subject matter jurisdiction by noting that unlike the latter, the former can be waived, and that a sanction presuming the establishment of personal jurisdiction "creates no more of a due process problem than the Rule 12 waiver"). Yet, the West Virginia Court essentially presumed subject matter jurisdiction here, by failing to state a basis for its exercise of jurisdiction in the face of a record that belied the existence of jurisdiction.[10]

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[10] It is not uncommon for this Court to set aside a judgment where the opinion of a state court of last resort is silent or inadequate on a critical issue of constitutional magnitude. *See, e.g., Aquilino v. United States*, 363 U.S. 509, 515 (1960) ("We find no discussion in the court's opinion to indicate the nature of the property rights possessed by the taxpayer under state law. Nor is the application to be made of federal law clearly defined. We

"A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators." *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938). Yet, the West Virginia Court has effectively done just that, contrary to its own previous decisions and the decisions of this Court, by conferring jurisdiction on itself in the face of a record that reveals there is no jurisdiction. Ultimately, this Court is the only check on the obligation of a state court of last resort to examine and affirmatively resolve a challenge to its own subject matter jurisdiction. Consequently, when a judgment is rendered by a state court, *ultra vires*, without subject matter jurisdiction, this Court is empowered to set aside such judgment to prevent a violation of the Due Process Clause. *See, e.g., Scott v. McNeal*, 154 U.S. at 48-50 (setting aside state court judgment as violative of due process where this Court determined that, *inter alia*, state probate court was without subject matter jurisdiction under applicable state law). In this case, Petitioner respectfully submits that the West Virginia Court's refusal to state the basis for the exercise of its subject matter jurisdiction, which is patently absent from the record, warrants at a minimum a reversal and remand with directions to the West Virginia Court to state the basis for its exercise of subject matter jurisdiction.[11] Otherwise, there

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believe that it is in the interest of all concerned to have these questions decided by the state courts of New York."); *Clemons v. Mississippi*, 494 U.S. 738, 753 (1990) (remanding a case for "a detailed explanation based on the record" when the lower court failed to undertake an explicit analysis supporting its "cryptic" one-sentence conclusion of harmless error); *Sochor v. Florida*, 504 U.S. 527, 540 (1992) (similar).

[11] In *Flippo v. West Virginia*, 120 S.Ct. 7 (1999) (*per curiam*), this Court recently remanded a case upon the award of a petition for writ of certiorari after determining that a West

will be no check on the state courts, particularly in those cases where the existence of jurisdiction does not appear in the record. In such cases, a state court would be able to evade review simply by remaining silent in the face of a challenge to its jurisdiction.

II. THE WEST VIRGINIA COURT VIOLATED THE DUE PROCESS CLAUSE BY REVERSING AN ORDER GRANTING THE PETITIONER A NEW TRIAL BASED UPON A FINDING OF PARTY MISREPRESENTATION PREMISED UPON THE TRIAL COURT'S PERSONAL OBSERVATIONS OF THE PLAINTIFF'S DEMEANOR DURING TRIAL AND COMPARISONS OF SUCH DEMEANOR WITH A POST-TRIAL SURVEILLANCE VIDEOTAPE, WHERE THE WEST VIRGINIA COURT LACKED ANY EVIDENTIARY BASIS FOR MAKING SUCH COMPARISON.

Even assuming, *arguendo*, that the West Virginia Court had subject matter jurisdiction to review the trial court's award of a new trial,[12] the decision to reverse that award still resulted in a violation of Petitioner's federal due process rights. This Court repeatedly has concluded that the complete absence of evidence to support a court's determination results in a denial of due process. *See, e.g., Schware v. Board of Bar Examiners of State of N.M.*, 353 U.S. 232 (1957). By reversing the trial court's order, which was

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Virginia court had failed to comply with the strictures of the Fourth Amendment, as interpreted in a previous decision of this Court. A similar remand might be appropriate to require the West Virginia Court to state the basis, if such exists, for its exercise of subject matter jurisdiction in this proceeding.

[12] Obviously, resolution of the jurisdictional issue in favor of Petitioner would render unnecessary addressing the merits of Petitioner's second due process argument.

premised on a comparison of the plaintiff's trial demeanor and his demeanor on a post-trial surveillance videotape – a matter the West Virginia Court lacked any evidentiary basis to assess, much less dispute – the West Virginia Court rendered a decision that lacked any evidentiary support, and thus, violated Petitioner's right to due process.

The trial court very explicitly detailed the basis for its award of a new trial: a comparison of (1) its firsthand observation of Mr. Gerver's demeanor at trial – a man who "moved about the courtroom gingerly, projecting very obvious discomfort and pain," and who "unsuccessfully fought back tears as he described the devastation this pain had wreaked upon his life, his family, his relationship with his wife" – with (2) the Mr. Gerver who appeared on the videotape – a man "performing a number of normal life activities (weed-wacking, lawn-mowing, attending sporting events, carrying objects, climbing bleachers and having an elementary-school-age child sit on his lap) all without any apparent restrictions, pain or discomfort." (App. at 34.) Based on that comparison, the trial court concluded that, "[t]he person depicted in the video and the person that Plaintiff [Mr. Gerver] represented himself to be, through his words and actions before the jury, are two different persons." (*Id.*) That conclusion in turn led the trial court to award a new trial, since Respondents based their claims against Dr. Benavides, both as to liability[13] and damages, on their

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[13] The trial court stated:

> Central to the Plaintiffs' claim in this case is the representation that Kent Gerver, through negligence of Dr. Benavides, was caused pain which is intense and continuing and renders Kent Gerver unable to maintain employment or to enjoy life.

subjective descriptions of Mr. Gerver's allegedly intolerable pain.

In reversing the award of a new trial, the West Virginia Court substituted itself as factfinder, even though that court was not present at trial, and thus could draw no conclusions about Mr. Gerver's trial demeanor. Notwithstanding that the trial court based its ruling on the fact that the videotape recording contradicted Mr. Gerver's *demeanor*, the majority opinion concluded that the videotape recording did not contradict "the plaintiffs' *testimony* regarding the inception and duration of his pain, and the debilitating effect of that pain on his life." (App. at 9-10.) On that basis, the majority reinstated the $2.1 million verdict against Petitioner.

The West Virginia Court's decision conflicts with both its own prior holdings and relevant decisions of this Court. Prior to this case, the West Virginia Court consistently had disclaimed any competence or ability to act as factfinder, recognizing that it was not capable of judging credibility or demeanor since it was not present at trial.[14]

> No x-ray, sonogram, M.R.I., ct/scan, dye test, nor any other testing procedure, can scientifically establish the existence or extent of pain. Pain is subjective and must be described by the person experiencing it.

(App. at 33.)

[14] *See, e.g., Michael D.C. v. Wanda L.C.*, 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997) ("[a] reviewing court cannot assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations."); *In re Public Building Asbestos Litigation*, 193 W. Va. 119, 125-26, 454 S.E.2d 413, 419-20 (1994) (noting trial court's opportunities "to observe many things at trial which the printed record presented to an appellate court does not disclose") (citation omitted), *cert. denied sub nom.*, 515 U.S. 1160 (1995); *Pallotto v.*

This Court reached the same conclusion in *Hernandez v. New York*, 500 U.S. 352 (1991), affirming the trial court's credibility findings regarding the reasons offered for a prosecutor's peremptory challenges, because "evaluation of the prosecutor's state of mind *based on demeanor and credibility lies peculiarly within a trial judge's province. . . .*" *Id.* at 366-37 (emphasis added); *see also Reynolds v. United States*, 98 U.S. 145, 156-57 (1878) ("[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case."). The West Virginia Court's opinion invading the trial court's province thus also conflicts with *Hernandez*.

The reversal of the trial court based on the purported lack of contradiction between Respondent Kent Gerver's testimony and his appearance in the post-trial videotape recording also conflicts with other decisions of this Court. This Court has uniformly concluded that it is a violation of due process to render a decision that lacks any evidentiary support. Rather, there must be at least "some evidence in the record" to support a finding in order to comport with the minimum requirements of due process. *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 454 (1985).[15] In this case, there

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Cherry River Paper Co., 106 W. Va. 60, 65, 144 S.E. 720, 721-23 (1928) (contrasting trial court's ability to observe witnesses and their "appearances, demeanor and conduct throughout the trial" with appellate court's review, based on the "dry, lifeless record") (citation omitted).

[15] *See also Vachon v. New Hampshire*, 414 U.S. 478 (1974) (conviction reversed for lack of due process where "independent examination of the trial record" revealed no

was simply no evidence in the record to dispute the trial court's findings regarding the demeanor of Respondent Kent Gerver at trial. A review of his trial *testimony* provided absolutely no evidentiary basis for determining his trial *demeanor*.

The violation of due process resulting from the West Virginia Court's decision is particularly apparent upon review of this Court's decision in *Schware v. Board of Bar Examiners of State of N.M.*, 353 U.S. 232 (1957). In that case, this Court found a due process violation in excluding an applicant from the practice of law because there was no evidence in the record to support the finding that the applicant had engaged in conduct that reflected adversely on his character. The Court found no fault with the standards announced by the state court, but rested its reversal on the state court's application of those standards: "Even in applying permissible standards, officers of a State cannot exclude an applicant where there is no basis for their finding that he fails to meet these standards. . . . " *Id.* at 239.

The same holds true in this case. Petitioner has no quarrel with the legal standards announced by the West Virginia Court for setting aside a judgment or for review of a trial court's order granting a new trial. (*See* App. at

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evidence to support finding that petitioner sold offending button to a minor); *Douglas v. Buder*, 412 U.S. 430 (1973) (*per curiam*) (probation revocation invalid under Due Process Clause where there was no evidentiary support for finding that probation conditions were violated); *Gregory v. City of Chicago*, 394 U.S. 111 (1969) (conviction void under Due Process Clause where there was no evidence in the record that conduct was disorderly); *Thompson v. City of Louisville*, 362 U.S. 199 (1960) (conviction was void under Due Process Clause where there was no evidentiary support in the record that petitioner was "loitering" or engaging in "disorderly conduct" within the meaning of state statutes).

7-9.) For example, Petitioner would not dispute that a trial court's erroneous statement regarding the content of a witness' testimony, or an erroneous application of facts to law, could properly be reversed on appeal. That was not, however, the basis for the West Virginia Court's reversal in this case. Rather, like the state court in *Schware*, although the West Virginia Court applied permissible standards, it erred in basing its application of those standards on a finding that the videotape did not contradict Respondents' testimony regarding his pain. (*See id.* at 9-10.) When one views this finding within the context of the relevant comparison conducted by the trial court, there was simply no evidentiary support for that finding.

First, the West Virginia Court's finding misapprehended the actual basis for the trial court's ruling, which was Mr. Gerver's trial demeanor – not his bare testimony. Consequently, the appellate court's comparison of the videotape recording and the "dry, lifeless record" provided no evidentiary support for the reversal. Petitioner asserts that predicating reinstatement of a $2.1 million verdict on a review of the trial transcript, where the trial court found – based on a comparison of its own observation of the litigant's trial and post-trial demeanor – that the verdict had been secured through that litigant's misrepresentation of his condition at trial, constitutes a violation of due process.

Second, the West Virginia Court had no basis, other than the trial court's own factual findings based on its firsthand observation, on which to assess Mr. Gerver's trial demeanor. There was no other videotape recording from the trial, nor were there any affidavits from other observers regarding Mr. Gerver's trial demeanor. Thus, as Justice Maynard concluded in dissent, because the majority "did not see [Mr. Gerver's] demeanor at trial," there

was "absolutely no sound legal reason for th[e Supreme Court of Appeals] to second-guess the determination of the trial court. . . . " (App. at 19.) More importantly, insofar as there was absolutely no evidence in the record that "rationally justifie[d] a finding" rejecting the trial court's comparison of Mr. Gerver's trial demeanor and his demeanor on the post-trial videotape, the West Virginia Court's reversal of the trial court's order constituted a denial of due process to Petitioner. *Schware*, 353 U.S. at 246-47.

In basing reversal of the trial court's order on a finding that utterly lacks evidentiary support, the West Virginia Court deprived Petitioner of due process. Moreover, the manner in which the West Virginia Court arrived at its decision – disregarding the trial court's firsthand observations of witness demeanor, and substituting for those observations its own review of the trial transcript, which offered no evidence of demeanor – presents a particularly dangerous precedent if permitted to stand. Petitioner therefore respectfully urges this Court to issue a writ of certiorari and resolve this important issue of due process.

CONCLUSION

Unless state courts of last resort, acting *ultra vires* and clearly without subject matter jurisdiction, can avoid this Court's review merely by ignoring the issue, due process dictates that those courts articulate some basis for the exercise of subject matter jurisdiction where there has been a timely challenge to, and there is an apparent absence of, jurisdiction. In this regard, Petitioner modestly seeks the same remedy this Court would afford upon review of a similar decision by a federal court of appeals, namely a remand to the West Virginia Court

with directions to articulate the basis for exercise of its subject matter jurisdiction.

Alternatively, with respect to the award of a new trial following a verdict procured by misrepresentation in the opinion of the trial judge who personally observed the plaintiff's demeanor at trial and on a post-trial surveillance videotape, due process precludes a state court of last resort from setting aside such new trial order and reinstating such verdict where the appellate court lacks any evidentiary basis for rejecting the trial judge's credibility determinations. In this regard, the Petitioner seeks reinstatement of the order awarding a new trial based upon misrepresentation.

Petitioner respectfully urges this Court to issue a writ of certiorari, and address directly these two important issues of federal law that have not been, but should be, resolved by this Court.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

September 1999 Term

No. 26355

KENT A. GERVER and
BILLIE JO GERVER,
Plaintiffs below, Appellants,

v.

AURELIO BENAVIDES, M.D.,
Defendant below, Appellee.

Appeal from the Circuit Court of Berkeley County
Honorable David H. Sanders, Judge
Civil Action No. 96-C-459

REVERSED AND REMANDED

Submitted: October 5, 1999
Filed: December 13, 1999

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The Opinion of the Court was delivered PER CURIAM.

JUDGE ROBERT B. STONE, sitting by temporary assignment.

JUSTICE MAYNARD dissents and reseves the right to file a dissenting opinion.

JUSTICE SCOTT did not participate in the decision of the Court.

SYLLABUS

" 'Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence.' Syl. pt. 4, *Sanders v. Georgia-Pacific Corp.*, 159 W.Va. 621, 225 S.E.2d 218 (1976)." Syllabus Point 1, *Andrews v. Reynolds Memorial Hospital, Inc.*, 201 W.Va. 624, 499 S.E.2d 846 (1997).

Per Curiam:

In this appeal from the Circuit Court of Berkeley County, we are asked to examine a June 22, 1998 order that set aside a medical malpractice jury verdict in favor of the plaintiffs, and awarded the defendant physician a new trial. After a careful consideration of the briefs, arguments of the parties, and all matters of record, we conclude that the circuit court abused its discretion in setting aside the jury's verdict.

As set forth below, we reverse and remand the circuit court's order, and remand the case for entry of judgment on the jury's verdict.

I.

On October 7, 1994, the appellee and defendant below, Aurelio Benavides, M.D., performed a vasectomy on the appellant and plaintiff below, Kent Gerver, using a local anesthetic. During the procedure, Mr. Gerver testified that he suffered a sudden, sharp pain on the left side of his scrotum that "just felt like something was being ripped from [his] body."

The plaintiff testified that, subsequent to the surgery the severe pain in his groin continued. The plaintiff consulted with doctors on 21 occasions in the 2 months after the vasectomy, seeking relief from the pain. Other specialists were consulted and procedures performed, and at the time of trial over 3 years later, Mr. Gerver testified that he was using the drug methadone to relieve the pain.

The plaintiff filed the instant action alleging that defendant Benavides was negligent in his performance of the vasectomy. After extensive discovery, the case was tried to a jury beginning on March 10, 1998.

Experts testifying on behalf of the plaintiff stated that the cause of the plaintiff's pain was most likely the defendant's placement of a suture through a nerve, and the defendant's failure to remove the suture. One of the plaintiff's experts testified that these actions by the defendant violated the standard of care. The plaintiff's

experts also testified that, to a reasonable degree of medical certainty, the plaintiff's pain was likely to continue into the future.

The plaintiff, during the course of his testimony, emphasized the chronic, unrelieved pain in his groin that he continued to have since the vasectomy. In addition to taking methadone, the plaintiff testified that he had been subjected to various other surgical and therapeutic procedures to attempt to relieve the pain. The plaintiff also testified to his full-time employment holding two jobs, his wages, and his work-related benefits before the vasectomy, and his inability to sustain gainful employment afterward. The plaintiff testified to having severe pain during intercourse, and the plaintiff's wife, Billie Jo Gerver, testified as to her loss of consortium due to her husband's injury.

After 3 days of trial, on March 13, 1998, the jury returned a verdict finding that the defendant had been negligent in his treatment of Mr. Gerver. The jury awarded Mr. Gerver $2,118,431.11 in damages, and Mrs. Gerver $50,000.00 for her loss of consortium. On March 18, 1998, the trial court entered a judgment order on the verdict awarding the plaintiffs $2,168,431.11 plus $40,623.52 in prejudgment interest.

After the circuit court entered its judgment order, defendant Benavides filed several post-trial motions pursuant to the *West Virginia Rules of Civil Procedure*. A hearing on the motions was scheduled for May 11, 1998, but the defendant asked for and received a continuance. Then, on June 1, 1998, the defendant filed a motion pursuant to Rule 60(b)(3), seeking to set aside the trial court's

judgment order on the ground of fraud. Included with the Rule 60(b)(3) motion was a video surveillance tape showing Mr. Gerver, his wife, and his children on a variety of occasions between March 28 and May 23, 1998. On the tape, Mr. Gerver can be seen performing such tasks as lifting a plastic lawn chair, sitting on a riding lawn mower, operating a weedwacker, and bending over to pick up a piece of garbage.

The circuit court conducted a brief hearing on June 8, 1998 and heard the various motions made by the defendant. On June 22, 1998, the circuit court entered an order vacating the judgment and granting the defendant a new trial on two grounds.

The circuit court determined first, with respect to the sufficiency of the evidence, that the plaintiff's evidence relating to liability and damages depended largely upon the plaintiff's subjective description of his pain. The circuit court held that "the credibility of that claim is the absolute linchpin of the Plaintiff's case," and that the video tape "seriously call[s] into question that credibility[.]" The court found that the video tape "amounts to proof of misrepresentation." To "avoid a miscarriage of justice," the circuit court felt compelled to award the defendant a new trial.

Second, the circuit court questioned the plaintiffs' evidence of lost or impaired future earning capacity. The circuit court believed that "lost earning capacity had not been established with reasonable certainty." During the course of the trial, the circuit court had allowed an economist to testify on behalf of the plaintiffs concerning the

amount of lost earning capacity sustained by the plaintiffs. After the economist testified, the circuit court excluded the testimony and instructed the jury to disregard any monetary figures suggested by the economist. The circuit court believed that the plaintiffs' failure to establish future lost earning capacity, combined with the economist's testimony, prejudiced the jury's verdict and was an additional reason warranting the granting of a new trial.

At the June 8, 1998 hearing, the circuit court gave no indication that it considered the hearing to be an evidentiary hearing, or that the court was inclined to consider the surveillance video tape submitted by the defendant. Accordingly, the plaintiffs subsequently filed two motions to alter or amend the circuit court's June 22, 1998 order. In both of the plaintiff's [sic] motions, they asked the circuit court for an opportunity to present evidence to rebut the defendant's allegations.[1]

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[1] Attached to the plaintiffs' second motion was a video tape of the plaintiffs' 8-year-old, 71-pound daughter, with her broken arm in a cast, handling the same weedwacker and carrying the same 8-pound plastic chairs carried by Mr. Gerver in the defendant's video tape.

A report was also attached from Dr. John D. Justice who offered an opinion that nothing in the defendant's video tape showed that the plaintiff was not truthful in his reports of pain. Dr. Justice was apparently not informed of the nature of the plaintiffs' case, nor was he told whether he was reviewing the video tape for the plaintiff or defendant. Dr. Justice was asked by plaintiffs' counsel to review the tape (with the sound eliminated) as an exhibit in a fictitious case styled "Smith v. Jones."

Both of the plaintiffs' motions were denied without a hearing. This appeal was then filed.

II.

The appellants in this case ask that we examine the circuit court's June 22, 1998 order granting the appellee a new trial. As we have cautioned, the power to grant a new trial should be used with care, and a circuit judge "should rarely grant a new trial." *In re State Public Bldg. Asbestos Litigation*, 193 W.Va. 119, 124, 454 S.E.2d 413, 418 (1994).

> "Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence." Syl. pt. 4, *Sanders v. Georgia-Pacific Corp.*, 159 W.Va. 621, 225 S.E.2d 218 (1976).

Syllabus Point 1, *Andrews v. Reynolds Memorial Hospital, Inc.*, 201 W.Va. 624, 499 S.E.2d 846 (1997).

We review an order granting a new trial under an abuse of discretion standard. Syllabus Point 3, *In re State Public Bldg. Asbestos Litigation, supra.* "[W]hen a trial court abuses its discretion and grants a new trial on an erroneous view of the law, a clearly erroneous assessment of the evidence, or on error that had no appreciable effect on the outcome, it is this Court's duty to reverse." *Tennant v. Marion County Health Care Foundation*, 194 W.Va. 97, 106, 459 S.E.2d 374, 383 (1995). Similarly, this Court will reverse a circuit court order setting aside a jury verdict

when a consideration of all the evidence clearly shows that the case was properly one for jury determination. *See, e.g., Syllabus Point 1, Utter v. United Hospital Center, Inc.*, 160 W.Va. 703, 236 S.E.2d 213 (1977).

With these standards in mind, we examine the arguments of the parties.

III.

A.

Evidence of Fraud or Misrepresentation

The plaintiffs assert that the trial court abused its discretion in setting aside the jury's verdict, and that the circuit court was clearly wrong in its finding that the defendant's post-trial video tape of the plaintiff "amounts to proof of misrepresentation and sufficiently calls into question the credibility of the Plaintiffs as to merit a new trial in the interest of justice."

Under *W.Va.R.Civ.P.* Rule 60(b)(3) [1998],[2] a judgment may be set aside for fraud or misrepresentation discovered after entry of judgment. Fraud is defined as anything falsely said or done to the injury of property rights of another. Actual fraud is intentional, and consists of an

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[2] *W.Va.R.Civ.P.* Rule 60(b)(3) [1998] states, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . .

intentional deception or misrepresentation to "induce another to part with property or to surrender some legal right, and which accomplishes the end designed." *Stanley v. Sewell Coal Co.*, 169 W.Va. 72, 76, 285 S.E.2d 679, 683 (1981). *See also, Hulings v. Hulings Lumber Co.*, 38 W.Va. 351, 372, 18 S.E. 620, 628 (1893).

We have also made clear the high burden of proof necessary to establish fraud. "Fraud is never presumed and when alleged it must be established by clear and distinct proof." Syllabus Point 5, *Bennett v. Neff*, 130 W.Va. 121, 42 S.E.2d 793 (1947). In accord, Syllabus Point 5, *Calhoun County Bank v. Ellison*, 133 W.Va. 9, 54 S.E.2d 182 (1949).

The surveillance video tape submitted by the defendant shows the plaintiff engaged in a variety of non-strenuous activities. The defendant asserts that the video tape impeaches the plaintiff's testimony that he suffers from continuous pain. The plaintiff, however, never testified at trial that he could not perform the activities shown on the video tape, and no evidence was submitted by the defendant to suggest that, prior to trial, the plaintiff represented that he could not perform these activities.[3]

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[3] The plaintiff's medical records, submitted to the jury, also support a conclusion that the plaintiff's pain did not preclude him from engaging in such activities as riding on a lawnmower or carrying a plastic chair. One physician's report indicates that the plaintiff "does not exhibit any particular impairments in range-of-motion, strength, reflexes or sensation which would preclude normal activities. However, he does exhibit severe pain behaviors with sitting, standing and moving about in general." Another report states that "[h]e is able to heel and toe walk. He is able to squat."

Nothing in the video tape contradicts the plaintiffs' testimony regarding the inception and duration of his pain, and the debilitating effect of that pain on his life.

Furthermore, we are also troubled by the circuit court's refusal to hold an evidentiary hearing to examine the plaintiffs' evidence submitted to refute the defendant's allegations. As we stated in the Syllabus of *Meadows v. Daniels*, 169 W.Va. 237, 286 S.E.2d 423 (1982):

> Where a Rule 60(b) motion is made to set aside a judgment and there is a conflict as to the facts on whether there is a ground to set aside the judgment, the trial court should hold a hearing to resolve the disputed facts and make some findings relative thereto.

The plaintiffs' video tape is inconsistent with the defendant's suggestion that the surveillance video tape constitutes clear and convincing evidence of fraud.

The defendant's surveillance video tape was presented to the circuit court as "newly-discovered evidence" of misrepresentations by the plaintiff,[4] and the circuit court found that the video tape discredited the plaintiff's testimony about his pain. As we have repeatedly stated, "[a] new trial on the basis of newly-discovered evidence will generally be refused when the sole object of the new evidence is to discredit or impeach a

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[4] Counsel for the defendant described the surveillance video tape during the hearing on the Rule 60(b)(3) motion in the following way: "Your Honor, this goes to something other than the damages in the case, it goes to the credibility and reliability of the very accounts on which the entire case from Plaintiffs' perspective was presented."

witness on the opposite side." Syllabus Point 2, in part, *State v. Stewart*, 161 W.Va. 127, 239 S.E.2d 777 (1977).

The circuit court in this case concluded that the defendant's surveillance video tape discredited and impeached the plaintiff's testimony. This was an improper basis for setting aside the jury's verdict, as Rule 60(b)(3) requires proof of intentional deception or misrepresentation by clear and convincing evidence. We therefore hold that the circuit court abused its discretion in awarding a new trial on the basis of fraud and misrepresentation.

B.

Lost Future Earning Capacity

Damages for loss or impairment of earning capacity are a type of future damages. Syllabus Point 10, *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618 (1974). In order to recover future damages, the permanency or future effect of any injury must be proven with reasonable certainty. Syllabus Point 9, *Jordan v. Bero*. In an injury case where the manifestations of the permanent injury are obscure, "positive medical evidence to a degree of reasonable certainty that the injury is permanent is sufficient to take the question to the jury and to support an award of damages for the future effects of such injury." Syllabus Point 13, *Jordan v. Bero*.

A litigant may prove the adverse future effect of an injury on earning capacity in two ways. First, a litigant may place before the jury a specific monetary value on damages for lost future earning capacity. However, to do so requires expert testimony. We held in Syllabus Point 2

of *Liston v. University of West Virginia Board of Trustees*, 190 W.Va. 410, 438 S.E.2d 590 (1993):

> Where a plaintiff wishes to quantify the loss of earning capacity by placing a monetary value on it, there must be established through expert testimony the existence of a permanent injury, its vocational effect on the plaintiff's work capacity, and an economic calculation of the monetary loss over the plaintiff's work-life expectancy reduced to a present day value.

Second, a litigant may choose not to quantify the loss of earning capacity, but instead allow the jury to award a general amount of damages for lost earning capacity. To do this,

> . . . the plaintiff must establish that there exists a permanent injury which can be reasonably found to diminish earning capacity. The plaintiff may then rely on lay or the plaintiff's own testimony to acquaint the jury with the injury's impact on his or her job skills. When this is done, the jury may assess a general amount of damages for diminished earning capacity[.]

Liston, 190 W.Va. at 414, 438 S.E.2d at 594.

In case *sub judice*, the evidence presented by the plaintiff to prove damages comports with the latter route. During the course of the trial, the plaintiff's physicians testified to the permanence of the plaintiff's injury, and one testified that the effects of the injury were "crippling" to the plaintiff. One physician testified that nothing further could be done surgically for the plaintiff which would reduce or eliminate his pain. Furthermore, plaintiff Kent Gerver testified that, because of his chronic pain

and his dependence on methadone to function, he was unable to return to gainful employment. The jury was presented with records showing the plaintiff's past wages and benefits (such as health insurance); with evidence that the plaintiff could no longer earn these wages and benefits; and with evidence that the plaintiff was a 34 year-old-man with a life expectancy of 41.4 more years.[5]

The plaintiff introduced evidence through his physicians such that a jury could find, to a reasonable degree of certainty, that the plaintiff suffered from a permanent injury. The jury could also find that the plaintiff's injury eliminated his future earning capacity, and had before it, without objection by the defendant, documents that would allow it to quantify the plaintiff's future lost earning capacity.

During the course of the trial, the plaintiff also offered the testimony of an economist, Dr. Richard Lurito, in an attempt to quantify the amount of lost future earning capacity sustained by the plaintiff. *See Liston*, Syllabus Point 2, *supra*. The defendant apparently objected to Dr. Lurito's testimony, arguing that the plaintiff had failed to establish through a vocational expert the specific effect the plaintiff's pain would have on his future earning capacity. The trial court allowed Dr. Lurito to testify, and instructed the jury that the court was reserving the question of the admissibility of Dr. Lurito's testimony until later in the trial. The trial court subsequently determined that it was error to allow Dr. Lurito to quantify the

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[5] It also appears that the plaintiff has been found to be permanently, totally disabled by the Social Security Administration.

plaintiff's lost future earning capacity, and instructed the jury to disregard his testimony.

The record does not contain Dr. Lurito's testimony, and we therefore do not decide whether the circuit court erred in striking his testimony. However, even in the absence of Dr. Lurito's testimony, we find evidence sufficient to support the conclusion that, to a reasonable degree of certainty, the plaintiff's future earning capacity was impaired by his injury. Furthermore, without objection by the defendant, the jury was presented with evidence of Mr. Gerver's earning capacity prior to the vasectomy.

We therefore find that the circuit court abused its discretion in granting a new trial on the erroneous basis that the plaintiff had failed to prove lost future earning capacity, or that the testimony of the plaintiffs' economist prejudiced the outcome of the trial.

C.

Cross-Assignment of Error

During the course of the trial, the defendant did not object to the circuit court's definition of "general damages" in the jury instructions and or to the list of "general damages" contained in the jury verdict form. More specifically, the defendant did not object to the circuit court's jury instructions which merged certain economic and

non-economic damages together under the heading of "general damages."[6]

The circuit court instructed the jury that it could return a verdict for "general damages," defined by the circuit court as including "[m]edical expenses in the future," "[p]ast and future physical pain and suffering," "[l]oss or impairment of future earning capacity and benefits," and "[l]oss of the capacity to enjoy life and to function as a 'whole man.' " The verdict form included a single line for the jury to assess a single, lump sum as "general damages," to which the defendants did not object.

The jury returned a verdict of "general damages" of $2 million.[7]

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[6] Counsel for the defendant did appear to make an objection to including "benefits" as a form of *special* damages, alleging that there was no evidence introduced by the plaintiff regarding lost "benefits." The defendant also objected to the inclusion of future medical expenses on the verdict form, again contending that the plaintiff introduced no evidence of future medical expenses. There is no indication as to the trial court's discussion or ruling on these objections in the trial transcript.

[7] As to the damages awarded by the jury, the verdict form states:

> 4. We the jury, upon the issues joined, find for the Plaintiff Kent Gerver and award him the following SPECIAL DAMAGES:
>
> For medical expenses to date: $ 30,301.52
>
> For lost wages and benefits to date: $ 88,129.59
>
> 5. We the jury, further find, with regard to GENERAL DAMAGES including the following categories:

In the defendant's cross-appeal, the defendant now insists that the jury's award of $2 million in "general damages" in this case exceeds the $1 million "cap" on non-economic damages established by *W.VA.Code*, 55-7B-8 [1986]. The defendant asks that we reduce the "general damages" portion of the verdict to $1 million.

This Court has held on several occasions that when a litigant seeks to make procedural distinctions between "special" damages and "general" damages, that litigant bears the burden of insuring that the circuit court distinguishes between types of damages in the jury's verdict form. *See, e.g., Grove by and through Grove v. Myers*, 181 W.Va. 342, 382 S.E.2d 536 (1989). In Syllabus Point 7 of *Miller v. Monongahela Power Co.*, 184 W.Va. 663, 403 S.E.2d 406 (1991), we made clear that "when the defendant fails to submit a special jury interrogatory asking the jury to set forth special or liquidated damages, this Court's attention to such errors is entirely a matter of grace[.]"

– For medical expenses in the future; and

– For past and future physical pain and suffering and mental anguish; and

– For loss or impariment of future earning capacity and benefits; and

– For loss of capacity to enjoy life and to function as a "whole man:"

2,000,000.00

6. We the jury, with regard to the issue of CONSORTIUM do find for the Plaintiff Billie Jo Gerver and award the ofllowing DAMAGES:

$ 50,000.00

TOTAL DAMAGES $ 2,169,431.11

Both the jury instructions and the jury's verdict form merged "special," economic-type damages, such as lost future wages and employment benefits and future medical expenses, with "general," non-economic-type damages, such as past and future pain and suffering and loss of capacity to enjoy life. The defendant did not object to the circuit court's instructions or verdict form, and did not submit special interrogatories that would allow the jury to segregate "economic" from "non-economic" losses. As there is no means to determine whether the non-economic damages assessed by the jury exceeded the $1,000,000 statutory limit, this Court will not presume that error occurred.

We therefore find no merit to the issue raised in the defendant's cross-appeal.

IV.

As set forth above, we reverse the circuit court's June 22, 1998 order granting a new trial, and remand the case for entry of judgment upon the jury's verdict.

Reversed and Remanded.

No. 26355 – *Kent A. Gerver and Bille Jo Gerver v. Aurelio Benavides, M.D.*

(Filed Dec. 16, 1999)

Maynard, Justice, dissenting:

I dissent because I do not believe the trial court abused its discretion in setting aside the jury's verdict and awarding a new trial based upon fraud.

God forbid that a trial actually be a search for the truth! Even though that is precisely what a trial should be, that is not how we currently think about trials. If you want an eye-opening test of public perception about the justice system, go out on the street and simply ask the first ten people you encounter if they think a trial today is a search for the truth and see what answers you get. In this case, thanks to the use of a video camera, however, the trial court below discovered the truth. Unfortunately, a majority of this Court is not happy with the discovery. Consequently, the majority manipulated some arcane points of law to reinstate a verdict in excess of two million dollars to a plaintiff who most likely is guilty of perpetrating a fraud on the trial court.

The verdict below was set aside and a new trial awarded after the trial court viewed the demeanor of the appellant, Kent Gerver, on surveillance videotape. The trial court found that the appellant's demeanor on videotape contrasted markedly with the appellant's demeanor at trial. According to the trial court, during trial, "Kent Gerver moved about the courtroom gingerly, projecting very obvious discomfort and pain. When he testified he

unsuccessfully fought back tears as he described the devastation this pain had wreaked upon his life, his family, his relationship with his wife." Specifically, the appellant testified that, as a result of his injury, his life was reduced to feeding his dog, taking short walks, reading the newspaper and watching television. The appellant's wife testified that she and the appellant no longer socialize because the appellant wants to be alone most of the time. The surveillance videotape, in stark contrast to his testimony, shows the appellant weed-whacking, lawn-mowing, attending sporting events, carrying objects, climbing bleachers and allowing small children to sit on his lap. Accordingly, the trial court concluded that "[t]he person depicted in the video and the person the Plaintiff represented himself to be, through his words and actions before the jury, are two different persons." The Court's rejection of this videotape evidence is especially troubling when one considers that the appellant's entire case was almost wholly predicated on his demeanor and subjective complaints of pain.

Further, while this Court could view the surveillance videotape contained in the record, it did not see the appellant's demeanor at trial. The trial court, on the other hand, watched the appellant's behavior throughout the trial and compared it with the contents of the videotape. Obviously, the trial court is in the better position to determine whether the surveillance videotape amounted to proof of fraud. Accordingly, there is absolutely no sound legal reason for this Court to second-guess the determination of the trial court under the facts of this case.

This is a case in which the appellant was awarded $2,168,431.11, not including prejudgment interest, for subjective evidence of pain later shown to be fraudulent. So not only will we allow the appellant to present a fraudulent picture to a jury, we will give him a two million dollar reward for so doing.

Based upon the evidence of fraud and other error, the trial court quite properly vacated the verdict and awarded a new trial. There is no reason to reverse this judgment. Accordingly, I dissent.

No. 26355 – *Kent A. Gerver and Bille Jo Gerver v. Aurelio Benavides, M.D.*

(Filed Jan. 7, 2000)

Starcher, C.J., concurring:

I concur with the majority, and believe that the circuit court overstepped its bounds in this case by setting aside the jury's verdict. The parties in this case fought hard on the issue of liability – plaintiff Kent Gerver contended that defendant-doctor Aurelio Benavides breached the standard of care, and the defendant responded that while something may have gone wrong during the vasectomy, the procedure was performed normally and within the standard of care exercised by doctors performing vasectomies.

The key here is that the defendant acknowledged that *something* went wrong with plaintiff Kent Gerver's vasectomy. The fight during the trial was over whether the defendant was at fault for what went wrong. The defendant suggested that adverse results happen when surgery is performed. Infections occur, wounds don't heal properly, scarring forms that causes pain, or the plaintiff may have had some other medical problem that was causing his pain. Something went wrong, and the jury had to sort out if the defendant was responsible.

What the defendant never really disputed was *how far* things went wrong. Counsel for the defendant pretty much conceded that the plaintiff was in a lot of pain. Counsel for the defendant never even requested their own medical examination of the plaintiff, or their own functional capacity test to see if the plaintiff's problems were that severe. Counsel for the defendant put all their eggs in the liability basket. They gave no attention to the issue of damages. In fact, it appears that they offered no evidence regarding the plaintiff's damages.

So when the jury decided that the defendant doctor *was* responsible for the plaintiff's injury, the jury merely looked at the evidence provided by the plaintiffs' counsel to figure out how much money to award the plaintiff. The record contains Mr. Gerver's entire employment file detailing his job as a machinist for General Electric, making over $35,000 a year. It also details the extensive pension benefits he could have received from the company had he not been forced to quit working, and shows that he would have to pay $449.00 per month to continue providing health insurance for himself and his family.

The jury was also given detailed lists from numerous drug stores showing the pain-killing drugs purchased by the plaintiff in the past, and the cost of those drugs now and in the future.

And from what I can tell in the record, the defendant never objected to the admission of any of these records. The jury took these records into the jury room when they deliberated.

The jury also heard how the plaintiff walked with pain, sat for long periods with pain, couldn't have intercourse without pain, went from being a machinist at work to sitting at an assembly line packing boxes with a bag of ice in his lap, and later having to stop working because his drug dosage made him unsafe to work around. The jury also heard how he was clinically depressed because of the disastrous impact the pain had on his life.

The jury was therefore not operating in the dark on the issue of damages. The jury worked with what it had, and it had a lot.

The record suggests that the plaintiff offered to settle the case for an amount within the defendant's policy limits, and apparently for an amount well under $2 million. The defendant gambled, believing that he would receive a jury verdict, but he lost.

It was only after the circuit court entered its judgment order that counsel for the defendant began his discovery on the issue of damages. Counsel for the defendant claims that some concerned (probably disgruntled) citizens were upset that the jury awarded Mr. Gerver

such a significant sum of money, and called to tell the defendant that the plaintiff was in nowhere near $2.2 million worth of pain. Mind you, these concerned citizens weren't sitting on the jury, and didn't hear the evidence that the jury heard.

So, the defendant hired a post-trial private investigator to follow the lead provided by these "concerned" citizens, and the private investigator proceeded to spy on the plaintiff with a video camera in hand. Much of the videotape taken by the investigator contains footage of the plaintiff sitting in a chair. Sitting in bleachers. Sitting on a riding lawnmower. Shuffling to throw away a piece of trash. Bending over to look underneath a car. And lots of footage of the plaintiffs' son playing baseball. Nothing really remarkable.[1]

Contrary to the suggestions made by my dissenting colleague, the videotape does *not* show the plaintiff doing gymnastics, or doing splits, or springing about – you should see it! It shows a man obviously in some discomfort, moving very slowly, shuffling about with his family. Shuffling with a weedwacker strapped over his shoulder. Shuffling with plastic chairs in hand that weigh a whopping 7 to 8 pounds. Sitting with his hands tucked between his legs, protecting his "parts." All while under the effects of methadone.

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[1] Actually, the footage made the hair on the back of my neck go up. To think that for 2 months, a private investigator sat around filming Mr. Gerver wherever he went – and if he couldn't film Mr. Gerver (because he wasn't around), he filmed Mrs. Gerver, or their children – it somehow seems almost subversive – un-American.

The circuit court felt that the videotape contradicted Mr. Gerver's courtroom testimony, because Mr. Gerver apparently was in great discomfort during the trial, shuffled to the witness stand, and cried when he described his pain. I agree that a trial judge is the best witness of a witness's demeanor, and for that reason this Court usually is highly deferential to a trial judge's decision to grant a new trial.

But the circuit court, in the transcript of the June 8, 1998 hearing, admitted that it didn't have a transcript of the trial, and that fact is important. The trial transcript reveals that Mr. Gerver testified that *he had reduced his dosage of methadone* to help him to testify more clearly. The circuit court apparently never considered this factor when considering why the plaintiff's demeanor was different during trial than on the surveillance videotape. More importantly, the circuit court only looked at the defendant's controversial, disputed video tape evidence, without giving the plaintiffs the opportunity to present rebuttal evidence, contrary to our holding in the Syllabus of *Meadows v. Daniels*, 169 W.Va. 237, 286 S.E.2d 423 (1982).

The circuit court seems to have never even looked at the plaintiffs' video tape, which shows the plaintiffs' 8-year-old daughter, with her broken arm in a cast, carrying the same chairs and using the same weedwacker used by Mr. Gerver in the defendant's surveillance video. The defendant's surveillance video might have been useful evidence had it been produced prior to trial, which it could have been. By "useful," I mean it might have assisted the jury in its determination of Mr. Gerver's

credibility. But, as the majority points out, newly discovered evidence affecting only credibility cannot be the basis for a new trial.

The jury's verdict – hard fought for by the plaintiff – is supported by the evidence. Counsel for the defendant simply dropped the ball, and didn't think damages were that big an issue during discovery. The defendant thought damages were important after the trial, but could only come up with the ridiculous surveillance videotape – which, when viewed with a careful eye, supports the jury's verdict!

To discredit this verdict is to discredit our American jury system, a jury system in which many of our citizens participate each year.

For all of its defects, the jury that our ancestors fought so hard to attain is a remarkable institution. What it actually means is that we have decided to give the ultimate say-so in our justice system to a diverse group of ordinary citizens – our fathers and mothers, our sisters and brothers, our co-workers, and our friends. We have decided that it is better to place our faith in the common-sense of ordinary citizens than in a trained class of professional jurors.

As a trial judge for 20 years, and as an appellate judge for an additional 3 years, I have watched many juries work, and I share this faith more than ever. I believe that justice is too important to be left to lawyers and judges alone. Justice must remain in the day-to-day hands of ordinary people. This is a an extraordinary idea, deeply rooted in our past – an idea and a history of which

we can be proud. It is an idea that – if we stick with it – can give us optimism and confidence for the future.

I believe that the circuit court clearly abused its discretion in granting a new trial, and therefore concur in the majority's opinion.

IN THE CIRCUIT COURT OF
BERKELEY COUNTY, WEST VIRGINIA

Kent A. Gerver and
Billie Jo Gerver, Husband and Wife
Plaintiffs,

vs. Civil Action **#96-C-459**

Aurelio Benavides, M.D.
Defendant.

ORDER GRANTING A NEW TRIAL

This matter comes on this **June 22, 1998,** upon the Defendant having filed with the Court certain Post-Trial Motions on March 31, 1998. The Plaintiff filed opposition to said motions April 20, 1998, and the matter was set for hearing before the Court for June 9, 1998. Before said hearing could be held, the Court received a Rule 60(b)(3) Motion for Relief From Judgment, accompanied by a video tape recording, received by the Court June 1, 1998. The Plaintiff then filed pleadings in opposition shortly before the hearing of post-trial motions. The matter then came on for the hearing of oral arguments **June 9, 1998** at which time the Plaintiffs both appeared in person and by their counsels, **Barry J. Nace,** Esq., and **D. Michael Burke,** Esq. The Defendant appeared in person and by counsel **William E. Galeota,** Esq., and **Ancil G. Ramey,** Esq.

The Defendant's Post Trial Motions are as follows: for a *Judgment Notwithstanding The Verdict,* pursuant to Rule 50(b), for a *New Trial,* pursuant to Rule 59(a); and/or for the Court *To Alter Or Amend The Judgment,* pursuant to Rule 59(e); based upon the following grounds:

1. That this court abused its discretion by permitting improper "rebuttal" evidence by the Plaintiff at the close of the case, which unfairly prejudiced the Defendant and served to unduly emphasize a single issue, entitling the Defendant to a new trial.

2. That the jury's verdict was contrary to the evidence regarding liability and therefore the Court should grant judgment for the Defendant notwithstanding the verdict.

3. That this Court erred in permitting the jury to consider the testimony of the Plaintiff's economist as to future lost wages as the Plaintiff had called no vocational expert to establish the certainty of any future loss of income and the Defendant is therefore entitled to a new trial.

4. That the two million dollar general damages figure exceeds the one million dollar "cap" established by West Virginia Code 55-7B-8 for non-economic damages and therefore the Court should amend the jury's verdict by reducing the general damages and the loss of consortium damages to one million dollars.

The Plaintiffs response in opposition to the above motions is:

1.) Rebuttal testimony is within the Court's sound discretion, and that this rebuttal was only objected to on a technical ground and not upon grounds if inadmissibility and that the evidence offered was legitimate impeachment of the Defendant's earlier testimony.

2.) The Plaintiff testified clearly as to the cause and source of the pain and expert testimony was adduced which stated to a reasonable degree of medical certainty

that the Plaintiff's pain would not have occurred absent an improper surgical procedure.

3.) The Defendant did not bring a motion in limine at pretrial to exclude the testimony of the Plaintiffs' economist even thought [sic] the Defense was aware of his testimony and knew that no vocational expert would be offered. Rather the Defendant allowed the witness to take the stand and begin the substance of his economic testimony before, in front of the jury, first raising the issue with the Court. That the Court's cautionary instructions and limits placed upon the economist's testimony were sufficient.

4.) That the statutory "cap" applies only to non-economic damages (like pain and suffering) and the verdict form, without objection by the Defendant, blends economic and non-economic damages together under the heading of "general damages," consequently no reduction may be performed as it is impossible to tell what component of the two million is economic and what is not.

The Defendant's Rule 60 (b)(3) Motion is based upon the following grounds:

5. That the Plaintiffs committed a material misrepresentation upon this Court, and the jury, by testifying falsely as to Kent Gerver's physical condition and the impact of that physical condition on his ability to work or enjoy life.

The Defendant offers a video recording of the Plaintiff, Kent Gerver, subsequent to the jury's verdict, attending sporting events, carrying lawn chairs, climbing

bleachers, allowing large children to sit on his lap, operating a gas-powered weed-wacker, operating a riding lawnmower (hopping off and on as required), all with reasonable energy and agility and without apparent pain. This the Defendant contrasts with the tortured, tearful appearance of both Plaintiffs in the courtroom and before this jury during the trial, and with their testimony as to ruined lives and unending, unendurable pain.

The Plaintiffs response in opposition to the Rule 60(b)(3) motion is:

5.) That the video does not demonstrate fraud as pain is not something easily photographed and the Plaintiff was on a methodone pain killing medication which would mute his pain symptoms. Also the Plaintiffs register outrage at being surreptitiously videotaped as a violation of privacy, resent the allegation of fraud and see it as a measure of Defendant's desperation.

Rulings by the Court

Having fully considered the post-trial pleadings of each side, the arguments of counsel, and weighing and considering the evidence offered at trial and the credibility of the witnesses, and the real possibility of a miscarriage of justice, the Court is of the opinion that the jury's verdict should be set aside and a new trial granted for the following reasons:

Sufficiency of the evidence

The Plaintiff, Kent Gerver, testified that he experienced intense pain during a vasectomy procedure performed by the Defendant and that the pain has persisted.

Plaintiffs' witness, Dr. Goodman, testified that the Plaintiff, Kent Gerver, was most probably injured in some way during the clamping or suturing procedures of the vasectomy, based upon the pain he has complained of since, and that this was a result of some deviation from the standard of care by Dr. Benavides. Dr. Theodorescue then testified that he performed a de-nervation of the spermatic cord in an attempt to address the reported problem of chronic pain.

Every bit of evidence relating to liability and damages depends upon the Plaintiff's subjective description of his pain. For this reason the credibility of that claim is the absolute linchpin of the Plaintiffs case. The information filed with this Court with the Defendant's Rule 60(b)(3) motion seriously call into question that credibility to the extent that this court is convinced a new trial should be granted to avoid a miscarriage of justice.

Inadmissible testimony as to loss of future earning capacity

Without having called an expert to establish any loss of future earning capacity with reasonable certainty, the Plaintiff called an economist to quantify damages from such loss. That witness was called, sworn and began his testimony without objection. There had been no motion in limine filed regarding this witness or his evidence even though the Defendant clearly knew what he would testify to, and the Defendant further knew that no vocational expert had been named by the Plaintiff.

Once this witness began testifying the Defendant objected and the matter was explored at sidebar. The

essence of the Defendant's objection was that, absent a vocational expert to give evidence that the Plaintiff Kent Gerver would actually never be able to again have employment, the testimony of an economist as to anticipated lost future earning capacity was inadmissible.

Because such a fundamental motion was made with the witness already before the jury, the Court allowed the testimony to go forward while first informing the jury that the Court was reserving ruling on the objection and would speak to the subject later. The economist then proceeded to place a figure of 1.3 million dollars of lost future earning capacity before the jury.

In later hearing, after the jury had been excused, the Court determined that such evidence should be inadmissible as lost earning capacity had not been established with reasonable certainty as required by *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618 (1974); *Adkins v. Foster*, 187 W.Va. 730, 421 S.E.2d 271 (1992), and; *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995). The Court determined that (1.) It would give a cautionary or curative instruction to the jury directing them to disregard Dr. Lurito's testimony with regard to the figure he had placed before them, and (2.) No separate award for Lost Earning Capacity would be allowed in the verdict form, rather such damages could only be considered as a part of general damages by the jury.

The verdict form, which was given the jury without objection by either side, contained one blank for general

damages, broken down into four subparts: future medicals; future pain and suffering; lost future earning capacity, and, lost ability to enjoy life. The jury awarded two million dollars as general damages.

This Court is convinced that the measures taken to undo the effect of the economist's having placed a 1.3 million dollar figure before this jury were insufficient to remove the taint caused by the introduction of this inadmissible and incompetent evidence. The Court sees this as sufficiently affecting the fundamental fairness of the trial as to merit a new trial.

Misrepresentation

The Rule 60(b)(3) Motion and the attached video is next considered.

Central to the Plaintiffs' claim in this case is the representation that Kent Gerver, through negligence of Dr. Benavides, was caused pain which is intense and continuing and renders Kent Gerver unable to maintain employment or to enjoy life.

No x-ray, sonogram, M.R.I, ct/scan, dye test, nor any other testing procedure, can scientifically establish the existence or extent of pain. Pain is subjective and must be described by the person experiencing it.

During the several days this matter was at trial, the Plaintiffs attended and projected, through expression, tears and body language, that Kent Gerver was in real pain. The testimony of the Plaintiffs' expert witnesses were premised upon the history of pain the Plaintiff related. Their testimony as to the Defendant's violation of

the standard of care was necessarily dependent upon this reported pain. At trial, Kent Gerver moved about the courtroom gingerly, projecting very obvious discomfort and pain. When he testified he unsuccessfully fought back tears as he described the devastation this pain had wreaked upon his life, his family, his relationship with his wife. Billie Jo Gerver was equally emotional as she tearfully portrayed a life ruined by her husband's pain. Every aspect of this case depends upon the reality of this constant and oppressive pain. The verdict demonstrated that the jury was convinced of lives ruined by unending, unendurable pain.

After the trial, the Defendant represents, reports came from several quarters that the Plaintiff was conducting himself publicly in a manner inconsistent with his claim of debilitating pain. In a crude video, taken by a private detective hired by the Defendant to look into these reports, the Plaintiff, Kent Gerver, can be seen performing a number of normal life activities (weed-wacking, lawn-mowing, attending sporting events, carrying objects, climbing bleachers and having an elementary-school-age child sit on his lap) all without any apparent restrictions, pain or discomfort. The person depicted in the video and the person that Plaintiff represented himself to be, through his words and actions before the jury, are two different persons. In the Court's estimation this amounts to proof of misrepresentation and sufficiently calls into question the credibility of the Plaintiffs as to merit a new trial in the interest of justice.

ACCORDINGLY, for the several reasons above discussed, it is hereby ADJUDGED and ORDERED that the verdict of the jury with regard to all issues in the

case is hereby set aside and A NEW TRIAL IS ORDERED, on liability and damages.

The Court notes the objection of the Plaintiffs to the entirety of the Court's rulings and notes the Defendant's objection to the Court's refusal to enter a judgment notwithstanding the verdict on the issue of liability. Resolution of the remaining issues raised by the Defendant is made unnecessary by the grant of a new trial.

The Clerk shall enter this Order as for the date first above mentioned and shall cause attested copies to be transmitted to counsel of record. The Court will contact counsel shortly in order to set a new trial date.

Entered: **June 22, 1998**

/s/ David H. Sanders
JUDGE OF THE CIRCUIT
COURT OF BERKELEY COUNTY

IN THE CIRCUIT COURT OF BERKELEY COUNTY,
WEST VIRGINIA

KENT A. GERVER and
BILLIE JO GERVER,

Plaintiffs,

v. CIVIL ACTION NO. 96-C-459
Judge Sanders

AURELIO BENAVIDES, M.D.

Defendant.

ORDER DENYING MOTION
TO ALTER OR AMEND

On a former day, came the plaintiffs, Kent A. Gerver and Billie Jo Gerver, by Burke & Schultz, and D. Michael Burke, Esq., and Paulson, Nace & Norwind, and Barry L. Nace, Esq., their attorneys and presented to the court their motion in writing to alter or amend the judgment entered by this Court on the 22nd day of June, 1998, awarding a new trial supported by written memoranda and exhibits. Thereafter, came the defendant, Aurelio Benavides, M.D., by Steptoe & Johnson, William E. Galeota, Esq., P. Gregory Haddad, Esq., and Ancil G. Ramey, Esq., his attorneys, and presented to the Court his response in opposition thereto.

Upon careful consideration whereof, the Court is of opinion to and doth hereby deny the subject motion for the reasons that (1) there has been no intervening change in controlling law; (2) there has been no assertion of newly discovered evidence; (3) there has been no sufficiently supported allegation of clear legal error in the award of a new trial; (4) alteration or amendment of the

judgment is not necessary or appropriate to prevent manifest injustice, but would create a manifest injustice; (5) the plaintiffs had a full and fair opportunity and took advantage of that opportunity to present evidence in conjunction with the Court's consideration of the defendant's motion for new trial and no further evidentiary proceedings are warranted; and (6) the factual and legal justifications contained in the judgment clearly support the exercise of the Court's sound discretion in the award of a new trial.

WHEREFORE, the plaintiffs' motion to alter or amend the judgment is hereby DENIED and the final judgment of this Court is hereby ENTERED, awarding the defendant a new trial in the above-referenced proceeding.

The Court notes the objection of the plaintiffs to this Order and the Clerk of this court is directed to enter JUDGMENT in the civil docket and transmit attested copies of this Order to all counsel of record.

Entered the 16th day of ~~July~~ September, 1998.

/s/ David H. Sanders
Judge of the Circuit
Court of Berkeley County

A TRUE COPY
ATTEST

Virginia M. Sine
Clerk Circuit Court

By /s/ Ruth Stephens
Deputy Clerk

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

KENT A. GERVER and
BILLIE JO GERVER,

Plaintiffs,

v.

CIVIL ACTION NO. 96-C-459
Judge Sanders

AURELIO BENAVIDES, M.D.

Defendant.

ORDER DENYING PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT DENYING PLAINTIFFS' MOTION TO ALTER OR AMEND [sic]

On September 28, 1998, came the plaintiffs, Kent A. Gerver and Billie Jo Gerver, by Burke & Schultz, and D. Michael Burke, Esq., and Paulson, Nace & Norwind, and Barry L. Nace, Esq., their attorneys and presented to the Court their second motion in writing to alter or amend the judgment entered by this Court on September 16, 1998, denying the plaintiffs' original motion to alter or amend. Thereafter, came the defendant, Aurelio Benavides, M.D., by Steptoe & Johnson, William E. Galeota, Esq., P. Gregory Haddad, Esq., and Ancil G. Ramey, Esq., his attorneys, and presented to the Court his response in opposition thereto.

Upon careful consideration whereof, the court is of opinion to and doth hereby deny the subject motion for the reasons that (1) the motion was not filed within 10 days of entry of the judgment entered on September 16, 1998, and is therefore untimely under R. Civ. P. 59(e); (2) even if timely filed under R. Civ. P. 59(e), the motion does

not raise grounds which could not have been timely raised in the original motion to alter or amend; (3) even if considered as a motion under R. Civ. P. 60(b), it does not allege any grounds which could be fairly construed under R. Civ. P. 60(b)(1)–(5), and this court finds no equitable justification for setting aside the new trial order; (4) the plaintiffs had adequate opportunities to present whatever evidence they desired in opposition to the defendant's motion for new trial both during the pendency of such motion and in conjunction with their original motion to alter or amend; and (5) this Court's review of the evidence submitted by the plaintiffs with regard to their second motion to alter or amend reveals no justification for conducting an evidentiary hearing or setting aside the order awarding a new trial for the multiple reasons set forth therein.

WHEREFORE, the plaintiffs' second motion to alter or amend the judgment is hereby DENIED.

The Court notes the objection of the plaintiffs to this Order and the Clerk of this Court is directed to transmit attested copies of this Order to all counsel of record.

Entered the 28th day of December, 1998.

/s/ David H. Sanders
Judge of the Circuit
Court of Berkeley County

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 17th day of February 2000, the following order was made and entered:

Kent A. Gerver and Billie Jo Gerver,
husband and wife, Plaintiffs Below, Appellants

vs.) No. 26355

Aurelio Benavides, M. D., Defendant
Below, Appellee

On a former day, to-wit, January 31, 2000, came the appellee, Aurelio Benavides, M. D., by Steptoe & Johnson, William E. Galeota, P. Gregory Haddad and Ancil G. Ramey, his attorneys, and presented to the Court his motion in writing for a stay of the issuance of the court's Mandate in the above-captioned proceeding pending application to the Supreme Court of the United States for a writ of certiorari. Thereafter, on the 10th day of February, 2000, came the appellants, Kent A. Gerver and Billie Jo Gerver, husband and wife, by Burke & Schultz, and D. Michael Burke, and Paulson & Nace, and Barry J. Nace, their attorneys, and presented to the Court their written response to the motion to stay the Court's Mandate and their motion in writing requesting this Court to require the appellee to post a performance bond for the full amount of the judgment, including prejudgment interest and postjudgment interest which has already accrued and which will further accrue during the pendency of a stay of the Court's Mandate.

Upon consideration whereof, the Court is of opinion to and doth hereby grant appellee's motion to stay the

issuance of the Court's Mandate in the above-captioned proceeding. It is therefore ordered that the issuance of the Court's mandate be, and it hereby is, stayed until the 17th day of May, 2000. The appellants' motion requesting the posting of a performance bond is hereby refused. Justice Starcher would grant the posting of a bond in the amount of costs. Justice McGraw would grant the posting of a bond in the amount of costs and interest.

A True Copy

Attest: /s/ Deborah L. McHenry
Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 26th day of January 2000, the following order was made and entered:

Kent A. Gerver and Billie Jo Gerver,
husband and wife, Plaintiffs Below,
Appellants

vs.) No. 26355

Aurelio Benavides, M. D., Defendant
Below, Appellee

The Court, having maturely considered the petition for rehearing filed by the appellee, Aurelio Benavides, M. D., by Steptoe & Johnson, William E. Galeota, P. Gregory Haddad and Ancil G. Ramey, his attorneys, the response thereto filed by the appellants, Kent Gerver and Billie Jo Gerver, by Burke & Schultz, and D. Michael Burke, and Paulson & Nace, and Barry J. Nace, their attorneys, the brief Amicus Curiae tendered on behalf of the West Virginia Business & Industry Council, and the brief Amici Curiae tendered on behalf of the West Virginia Medical Association, the West Virginia Hospital Association, the West Virginia Chapter of the American Academy of Family Physicians and the West Virginia Urological Society, is of opinion to and doth hereby deny said petition for rehearing. Chief Justice Maynard and Justice Scott would grant.

A True Copy

Attest: /s/ Deborah L. McHenry
Clerk, Supreme Court of Appeals

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 26355

KENT A. GERVER AND BILLIE JO GERVER,
PLAINTIFFS BELOW, APPELLANTS,

VS.

AURELIO BENAVIDES, M.D.,
DEFENDANT BELOW, APPELLEE.

(Filed Jan. 12, 2000)

Honorable David H. Sanders, Judge
Circuit Court of Berkeley County
Civil Action No. 96-C-459

PETITION FOR REHEARING

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I. INTRODUCTION

It is fundamental that "[u]nless jurisdiction exists, the judgment rendered is not by due process of law, and is ineffectual for any purpose; no rights are in any way affected by it, from it no rights can be derived, and all proceedings founded thereon are void and are not entitled to any respect in any other tribunal." 16B AM.JUR.2D *Constitutional Law* § 966 (1988).[1] In this case, the threshold issue was whether or not this Court had subject matter jurisdiction. Section 11 of the RESTATEMENT (SECOND) OF JUDGMENTS § 11 states that, "A judgment may properly be rendered only if the court has authority to adjudicate the type of controversy involved in the action." Where a litigant challenges subject matter jurisdiction, it is an essential element of due process that the tribunal state the basis of its subject matter jurisdiction. In Syllabus Point 1 of *James B. v. Carolyn M.*, 193 W. Va. 289, 456 S.E.2d 16 (1995), for example, this Court held:

> A court of limited appellate jurisdiction is obliged to examine its own power to hear a particular case. This Court's jurisdictional authority is either endowed by the West Virginia Constitution or conferred by the West Virginia

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[1] *See also* Syl. pt. 4, *Woodall v. International Brotherhood of Electrical Workers*, 192 W. Va. 673, 453 S.E.2d 656 (1994) (" 'In order to render a valid judgment or decree, a court must have jurisdiction both of the parties and of the subject matter and any judgment or decree rendered without such jurisdiction will be utterly void.' Syl. pt. 1, *Schweppes U.S.A. Limited v. Kiger*, 158 W. Va. 794, 214 S.E.2d 867 (1975).").

> Legislature. Therefore, this Court has a responsibility *sua sponte* to examine the basis of its own jurisdiction.[2]

Nevertheless, the majority opinion, filed on December 13, 1999, completely fails to even mention the appellee's challenge of this Court's subject matter jurisdiction.

II. STATEMENT OF FACTS

The appellants appealed an order denying their second R. Civ. P. 59(e) motion challenging an order awarding a new trial in this matter pursuant to R. Civ. P. 60(b)(3). The statute in effect at the time of entry of the order provided that this Court's appellate jurisdiction was limited to "final judgment[s]." This Court has previously held that a "final judgment" is an order that resolves all issues as to all parties leaving nothing but its enforcement. An order denying a R. Civ. P. 59(e) motion challenging the award of a new trial obviously does not resolve all issues as to all parties, but resolves nothing. Accordingly, this Court has previously held that such order does not constitute a "final judgment." This issue was fully briefed and argued by the parties, but this

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[2] *See also Butler v. Dexter*, 425 U.S. 262, 262 n.2, 96 S. Ct. 1527, 1527 n.2, 47 L.Ed. 2d 774 (1976) ("Although the appellee has not moved to dismiss the appeal, this Court must take notice on its own motion where jurisdiction does not appear. *Brown Shoe Co. v. United States*, 370 U.S. 294, 306, 82 S. Ct. 1502, 1513, 8 L. Ed. 2d 510, 524 (1962)."); *Bartles v. Hinkle*, 196 W. Va. 381, 472 S.E.2d 827 (1996) ("both a trial court and an appellate court must be satisfied with their power to adjudicate in every case and at every stage of the proceedings.").

Court's opinion fails to even mention this well-founded challenge to its subject matter jurisdiction.

In addition to deciding a case in which it did not have subject matter jurisdiction without stating the basis for such jurisdiction, this Court's opinion reverses an order without a sufficiently objective basis for such reversal. The trial judge's award of a new trial in this case was predicated upon his personal observations of the appellant, Kent Gerver's trial demeanor when contrasted to a post-trial surveillance videotape. Although this Court is obviously competent to view the videotape and make its own conclusions regarding Gerver's degree of observable impairment, it could not make any conclusions regarding the Gerver's trial demeanor. Where an appellate court lacks an objective basis for the reversal of a trial court's award of a new trial predicated upon the trial judge's personal observations of a litigant's trial demeanor, the appellee asserts that such reversal constitutes a denial of due process.

The only legitimate comparison relevant to this case was between Gerver's demeanor at trial and Gerver's demeanor on the videotape. As noted in the dissenting opinion, "[t]he trial court . . . watched the appellant's behavior throughout the trial and compared it with the contents of the videotape." *Gerver v. Benavides*, No. 26355 at 2 (W. Va. December 13, 1999) (Maynard, J., dissenting). Where the trial court's order was predicated upon his personal observation of Gerver's trial demeanor, any comparison between Gerver's ***trial testimony*** and Gerver's demeanor on the videotape is irrelevant. Yet, the majority opinion is predicated solely upon such comparison: "[t]he surveillance video tape submitted by the

defendant shows the plaintiff engaged in a variety of non-strenuous activities. . . . Nothing in the video tape contradicts ***the plaintiffs' testimony*** regarding the inception and duration of his pain, and the debilitating effect of that pain on his life." *Gerver, supra* at 7-8. [Emphasis supplied]. The trial judge never held that the videotape contradicted the Gerver's testimony; rather, his decision was based upon its contradiction of his trial demeanor:

> During the several days this matter was at trial, the Plaintiffs attended ***and projected, through expression, tears and body language, that Kent Gerver was in real pain.*** The testimony of the Plaintiffs' expert witnesses were premised upon the history of pain the Plaintiff related. Their testimony as to the Defendant's violation of the standard of care was necessarily dependent upon this reported pain. At trial, ***Kent Gerver moved about the courtroom gingerly, projecting very obvious discomfort and pain.*** When he testified he unsuccessfully ***fought back tears*** as he described the devastation the pain had wreaked upon his life, his family, his relationship with his wife. Billie Jo Gerver was equally emotional as she tearfully portrayed a life ruined by her husband's pain. Every aspect of this case depends upon the reality of this constant and oppressive pain. The verdict demonstrated that the jury was convinced of lives ruined by unending, unendurable pain.

[New Trial Order at 5]. [Emphasis supplied]. This Court had no means of observing Gerver's "expression," "tears," or "bodily language" at trial. This Court could not observe how Gerver "moved about the courtroom gingerly, projecting very obvious discomfort and pain"

and "fought back tears." As the appellee noted at oral argument, a cold transcript could not reflect Gerver's obvious exaggeration and/or fabrication of extreme pain and discomfort.[3]

Because of the interrelationship between Gerver's subjective reports of pain and his allegations of malpractice, another reason[4] given for the trial court's decision to award a new trial was that the evidence was rendered insufficient to support the jury's verdict:

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[3] Also essential to the trial court's order was not only that Gerver's exaggerated and/or fabricated expressions of extreme pain and discomfort at trial undermined the jury's award of damages, but also seriously undermined its determination of liability. There was absolutely no evidence at trial of any objective, clinical basis for Gerver's allegedly intractable pain:

> Central to the Plaintiffs' claim in this case is the representation that Kent Gerver, through negligence of Dr. Benavides, was caused pain which is intense and continuing and renders Kent Gerver unable to maintain employment or enjoy life.
>
> No x-ray, sonogram, M.R.I., ct/scan, dye test, nor any other testing procedure, can scientifically establish the existence or extent of pain. Pain is subjective and must be described by the person experiencing it.

[Order at 5-6]. [Emphasis supplied]. In other words, the appellants' entire case was predicated entirely upon Gerver's subjective reports to his physicians of intractable and debilitating pain, and his trial testimony and demeanor, while consistent with those reports, were completely inconsistent with his demeanor on the videotape.

[4] A third reason for the trial court's decision, independent of the fraud issue, was that the plaintiffs' evidence of lost or impaired future earing [sic] capacity had not been appropriately established and was inadmissible. The admission of said evidence irreparably prejudiced the appellee.

> The Plaintiff, Kent Gerver, testified that he experienced intense pain during a vasectomy procedure performed by the Defendant and that the pain has persisted. Plaintiffs' witness, Dr. Goodman testified that the Plaintiff, Kent Gerver, was most probably injured in some way during the clamping or suturing procedures of the vasectomy, based upon the pain he has complained of since, and that this was a result of some deviation from the standard of care by Dr. Benavides. Dr. Theodorescue then testified that he performed a de-nervation of the spermatic cord in an attempt to address the reported problem of chronic pain.
>
> ***Every bit of evidence relating to liability and damages depends upon the Plaintiff's subjective description of his pain. For this reason the credibility of that claim is the absolute linchpin of the Plaintiffs case. The information filed with this Court with the Defendant's Rule 60(b)(3) motion seriously calls into question that credibility to the extent that this Court is convinced a new trial should be granted to avoid a miscarriage of justice.***

[Order at 3-4]. [Emphasis supplied]. The majority opinion also fails to address this issue.

This Court's opinion also misstates the record with respect to the issue of the statutory cap. Despite its expressions to the contrary, footnote seven of the Court's opinion clearly indicates the jury verdict did expressly distinguish between "SPECIAL DAMAGES" and "GENERAL DAMAGES." Moreover, as there was no expert testimony regarding "medical expenses in the future" or

"loss or impairment of future earning capacity and benefits," which were listed under "GENERAL DAMAGES," it would have been impossible, under existing law, for the jury to return a verdict of any future economic damages. The Court's opinion appears to suggest, directly contrary to existing law, that a jury can return a verdict for future economic damages based upon its own calculations, without the benefit of expert testimony. If for no other reason, serious consideration should be given to a rehearing of this case. In any event, where no competent evidence was introduced that would have supported any economic component of the jury's award of "GENERAL DAMAGES," the appellee was entitled to the benefit of the statutory cap.

III. DISCUSSION OF LAW

A. THIS COURT'S OPINION, RENDERED WITHOUT SUBJECT MATTER JURISDICTION, VIOLATES DR. BENAVIDES' DUE PROCESS RIGHTS UNDER THE FEDERAL AND STATE CONSTITUTION.

On March 14, 1998, the Legislature amended W. Va. Code § 58-5-1, effective on June 17, 1998, which was five days before the entry of the new trial order on June 22, 1998, and ***six months before the entry of the order denying the Gervers' second R. Civ. P. 59(e) motion, which is the order from which their appeal was taken.*** The new appeal statute provides:

> A party to a civil action may appeal to the supreme court of appeals from a final judgment of any circuit court or from an order of any circuit court constituting a ***final judgment*** as to

> one or more but fewer than all claims or parties upon an express determination by the circuit court that there is no just reason for delay and upon an express direction for the entry of judgment as to such claims or parties.

[Emphasis supplied]. Formerly, W. Va. Code § 58-5-1 provided, in relevant part, that:

> A party to a controversy in any circuit court may obtain from the supreme court of appeals . . . an appeal from . . . (i) In any civil case where there is an order granting a new trial . . . and in such cases ***an appeal may be taken from the order without waiting for the new trial . . . to be had***. . . .

[Emphasis supplied]. The significance of this statutory change is reflected in previous decisions of this Court recognizing (1) the interlocutory nature of an order granting a new trial and (2) the non-appealability of an order granting a new trial in the absence of statutory authority.[5]

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[5] It is well-recognized by the federal courts that new trial awards are not appealable. The federal appeal statute, 28 U.S.C. § 1291, provides, in relevant part, that, "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all ***final decisions*** of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court." [Emphasis supplied]. Under this statute, federal courts of appeal lack appellate jurisdiction in cases involving the award of a new trial. *See, e.g., Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34, 101 S. Ct. 188, 66 L. Ed. 2d 193 (1980). In this regard, it has been noted:

In *Gonzalez v. Conley*, 199 W. Va. 288, 292, 484 S.E.2d 171, 175 (1997), this Court observed, "[W]hen a trial judge vacates a jury verdict and grants a new trial, he or she does not enter a final judgment." Rather, as the Court further noted, "Although an order granting a new trial is not a final order, W. Va. Code, 58-5-1(i) [1925] permits appeals from an interlocutory order granting a new trial. *See also Coleman v. Sopher*, 194 W. Va. 90, 95, 459 S.E.2d 367, 372 (1995). *Id.* at 292 n. 2, 484 S.E.2d at 175 n. 2. Thus, neither the West Virginia Constitution nor any West Virginia statute conferred upon this Court the jurisdiction to hear appeals of any interlocutory orders, including orders

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> An order granting a new trial usually is not appealable, since it is purely interlocutory and is not such a final judgment as the statute makes appealable. . . .
>
> A distinction must be observed, however, between appealability and reviewability. An order granting a new trial is not appealable, but it is certainly reviewable. On appeal from the final judgment following the second trial, the appellant may claim error in the grant of the new trial. If the appellate court agrees, it will reinstate the verdict reached at the first trial.

11 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2818 (1999). [Footnotes omitted]. It has been noted that, "When the legislature of a state adopts a statute which is identical or similar or to one in effect in other state or country, the courts of the adopting state usually adopt the construction placed on the statute in the jurisdiction in which it originated." Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION § 52.02 at 198. As the language of the federal appeal statute and the West Virginia appeal statute are essentially identical, the appellee submits that it should likewise be construed to deny the right to appeal a new trial order.

granting a new trial. Consequently, this Court was without jurisdiction to entertain the Gervers' appeal and, in doing so, violated the appellee's federal and state due process rights.

This very issue was addressed by the Supreme Court of Minnesota in *Ginsberg v. Williams*, 270 Minn. 474, 135 N.W.2d 213 (1965). In *Ginsberg*, the procedural rules had always allowed an appeal " '[f]rom an order involving the merits of the action or some part thereof.' " *Id.* at 216. Minnesota courts had consistently allowed a grant of a new trial to be appealed under that "catch all" provision. *Id.* The Minnesota Legislature, however, in 1963, removed the "catch all" subsection. Thus, the *Ginsberg* court concluded:

> The appeal here attempted is from an order which in effect vacated the judgment. ***Since the order was made after the effective date of the 1963 revision of the appeal code, defendant's right to appeal is governed thereby.***[6] Clearly, the merits of the order granting a new trial would be reviewable under our prior holdings were it not for the changes made by the 1963 revision of our Civil Appeal Code. For reasons which we can only surmise, § 605.09(3) was not reenacted as part of the revision. ***Thus, the statutory basis upon which this type of order was held appealable as of right no longer exists.***

Id. at 217. [Emphasis supplied]. Notably, the court expressed regret in the Minnesota Legislature's decision.

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[6] *See also Crimminger v. Habif*, 174 Ga. App. 440, 440-41, 330 S.E.2d 164, 164-65 (1985) (statute in effect at time of entry of judgment controls appeal from such judgment).

Id. Nevertheless, the court stated "we feel constrained under the circumstances to hold that the statutory right to appeal from the order before us no longer exists." *Id.* at 218.

Likewise herein, the statute was revised several months prior to the date of the order from which the Gervers' prosecuted their appeal. It is the revised statute, which no longer permits an appeal of a new trial order, that controls. Accordingly, this Court clearly lacked subject matter jurisdiction to entertain the appeal.

It is well-recognized that "whenever the Legislature enacts a provision, it is presumed to have had in mind the previous statutes relating to the same subject matter. Therefore, when a provision in an earlier version of a statute is omitted from a later version, the omission is deemed intentional and conveys a meaning." *Nakahara v. NS 1991 American Trust*, 739 A.2d 770, 780 (Del. 1998).[7] This principle was recognized by this Court in *Shawnee Bank, Inc. v. Paige*, 200 W. Va. 20, 26-27, 488 S.E.2d 20, 26-27 (1997), where it stated, " '[t]he Legislature must be presumed to know the language employed in former acts, and, if in a subsequent statute on the same subject it uses different language in the same connection, the court must presume that a change in the law was intended." Syl. pt. 2, *Hall v. Baylous*, 109 W. Va. 1, 153 S.E. 293 (1930). "Syl. pt. 2, *Butler v. Rutledge*, 174 W. Va. 752, 329 S.E.2d 118

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[7] *See also* Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION § 22.30 at 266 ("The courts have declared that the mere fact that the legislature enacts an amendment indicates that it thereby intended to change the original act by creating a new right or withdrawing an existing one.").

(1985)." It is well-established that, "The legislature may retroactively discontinue the right of appeal. . . . " Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION § 41.08 at 396. In this case, the West Virginia Legislature did not abolish any right of appeal, but merely amended the statute to delete the right to appeal an award of a new trial, as of the effective date of the amendment, which occurred before the entry of any post-trial orders in this case, removing any basis for the exercise of this Court's subject matter jurisdiction in this case.

It is also well-recognized that, "An appellate court is required to determine whether a notice of appeal was timely filed so as to give it jurisdiction, even where the issue of jurisdiction is not raised by a party." 5 AM. JUR. 2D *Appellate Review* § 291 (1995). Where an appeal is untimely filed, the appellate court simply lacks subject matter jurisdiction. As noted in the appellee's earlier brief, the Gervers failed to file a timely appeal from the denial of their original R. Civ. P. 59(e) motion. As this Court held in Syllabus Point 7 of *James M.B. v. Carolyn M., supra*, "A motion for reconsideration filed [pursuant to R. Civ. P. 59(e)] within ten days of judgment being entered suspends the finality of the judgment and makes the judgment unripe for appeal. When the time for appeal is so extended, its full length begins to run ***from the date of entry of the order disposing of the motion***." [Emphasis supplied]. Litigants are not permitted to file motion after motion under R. Civ. P. 59(e) and extend indefinitely the four-month appeal period. Accordingly, the appellee reiterates that this Court was also without subject matter jurisdiction because the Gervers failed to file their appeal

within four months of the denial of the original R. Civ. P. 59(e) motion.

In Syllabus Point 1 of *James B. v. Carolyn M.*, 193 W. Va. 289, 456 S.E.2d 16 (1995), this Court held:

> A court of limited appellate jurisdiction is obliged to examine its own power to hear a particular case. This Court's jurisdictional authority is either endowed by the West Virginia Constitution or conferred by the West Virginia Legislature. Therefore, this Court has a responsibility *sua sponte* to examine the basis of its own jurisdiction.[8]

This is because due process requires "a fair hearing before an impartial court or other tribunal ***having jurisdiction of the cause.***" 16B AM.JUR.2D *Constitutional Law* § 966 (1988) (emphasis added) (footnotes omitted). Thus, "[u]nless jurisdiction exists, the judgment rendered is not by due process of law, and is ineffectual for any purpose; no rights are in any way affected by it, from it no rights can be derived, and all proceedings founded thereon are void and are not entitled to any respect in any other tribunal." *Id.* Accordingly, the Court erred by failing to state the basis for its jurisdiction.

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[8] *See also Butler v. Dexter*, 425 U.S. 262, 262 n.2, 96 S. Ct. 1527, 1527 n.2, 47 L.Ed. 2d 774 (1976) ("Although the appellee has not moved to dismiss the appeal, this Court must take notice on its own motion where jurisdiction does not appear. *Brown Shoe Co. v. United States*, 370 U.S. 294, 306, 82 S. Ct. 1502, 1513, 8 L. Ed. 2d 510, 524 (1962).").

B. THIS COURT'S OPINION, REVERSING A TRIAL JUDGE'S AWARD OF A NEW TRIAL BASED UPON A COMPARISON OF HIS PERSONAL OBSERVATIONS OF A LITIGANT'S DEMEANOR AT TRIAL AND DEMEANOR ON A POST-VERDICT SURVEILLANCE VIDEOTAPE, LACKED ANY SUFFICIENTLY OBJECTIVE BASIS AND CONSTITUTED A VIOLATION [sic] DR. BENAVIDES' DUE PROCESS RIGHTS UNDER THE FEDERAL AND STATE CONSTITUTIONS.

As noted by Justice Maynard in the dissenting opinion, "[o]bviously, the trial court is in the better position to determine whether the surveillance videotape amounted to proof of fraud." *Gerver* at 2 (Maynard, J. dissenting). Prior to the *Gerver* decision, this Court recognized the overwhelming deference afforded a trial court in awarding a new trial as a result of the trial court's unique position. In *Pallotto v. Cherry River Paper Co.*, 106 W.Va. 60, 144 S.E. 720, 721-3 (1928), this Court noted:

> By granting a new trial for such reasons, a plaintiff is not denied right of recovery. And whether the error is such as to demand a new trial addresses itself peculiarly to the trial court. Having found error –
>
> > 'he may invoke and use, in addition thereto, his general knowledge of the case, ***obtained by observation of the parties, witnesses and jurors and their appearances, demeanor and conduct throughout the trial***. His judgment based upon the error and such knowledge is entitled to a ***high degree of respect***, in the appellate court, and the judgment or ruling

> will be sustained in cases and under circumstances not justifying award of a new trial, by the appellate court ***whose knowledge of the case is derived from the printed record alone.'*** *Levine v. Mantgell*, 90 W. Va. 166, 175, 111 S.E. 501, 504.
>
> The appellate court has a dry, lifeless record of the trial, while the lower court has a live record, if it may be so termed. We cannot say that the action of the court was clearly erroneous, and this rule precludes reversal.

[Emphasis supplied]. In *Green v. University of Chicago Hospitals and Clinics*, 258 Ill. App. 3d 536, 541, 631 N.E.2d 271, 275, 197 Ill. Dec. 268, 272 (1994), the defendants appealed a $3 million judgment in favor of a plaintiff in a medical malpractice case, arguing that the trial demeanor of plaintiff's counsel, which included "throwing his glasses down, slamming doors, and stalking around the courtroom," unduly influenced the jury. Rejecting this argument in affirming the judgment, the court stated:

> A trial judge's decision on such matters is accorded great deference on appeal. . . . The attitude and ***demeanor*** of counsel, as well as the atmosphere of the courtroom, ***cannot be reproduced in the record***. As a result, we yield to the trial judge's singular position of assessing and determining the impact of improper conduct on the part of counsel.

Id. at 541-42, 631 N.E.2d at 275-76, 197 Ill. Dec. at 272-73. [Emphasis supplied]. Likewise, in the instant case, the appellants' trial demeanor could not be reproduced in the record, and this Court should have yielded to the trial judge's decision to award a new trial was awarded for

fraud, misrepresentation, and miscarriage of justice predicated upon such trial demeanor.[9]

The failure to afford the appropriate deference to the trial court's credibility determinations constitutes a denial of due process. In *Hernadez v. New York*, 500 U.S. 352, 366-67, 111 S. Ct. 1859, 1869-70, 114 L. Ed. 2d 395 (1991), for example, where it affirmed a trial judge's credibility findings regarding the reasons offered for a prosecutor's peremptory challenges, attacked as being

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[9] In Syllabus Point 3 of *Rogers v. Goforth*, 121 W. Va. 239, 2 S.E.2d 903 (1939), this Court addressed the issue of "the improved condition of the plaintiff subsequent to the trial" and stated that such evidence "should be considered in support of a motion for a new trial . . . where the supporting affidavits indicate that plaintiff's claim, in the first instance, was based on fraud and concealment." In this regard, it has been noted:

> A new trial may be granted where subsequent events disprove, with reasonable certainty, the character or extent of bodily injury for which recovery was had, such as where a woman whose injuries appeared at trial to have rendered her sterile gives birth to a child only months after trial, ***or where a person whose injuries appear at trial to have rendered him or her significantly disabled is discovered to have engaged in activities inconsistent with such a disability after the trial.***

58 Am. Jur. 2d *New Trial* § 424 (1989) (emphasis added) (footnotes omitted). "[W]]here a plaintiff fraudulently makes use of crutches on the trial of a personal injury action," for example, it has been observed that, "a new trial should be granted." *Id.* at § 291 (1989) (citing *Corley v. New York & H.R. Co.*, 12 App. Div. 409, 42 N.Y.S. 941). This Court's decision effectively allows a plaintiff to be discovered throwing his crutches aside after a $2 million verdict, contrary to *Rogers*, but to retain the benefit of his deceit.

racially-motivated, the Supreme Court of the United States stated, "evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.' . . . The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." [Citations omitted].[10] Likewise, in the instant case, where evaluation of Mr. Gerver's demeanor and credibility was involved, there was nothing left to review, and this Court's reversal constituted a denial of due process.

C. THIS COURT'S OPINION MISREPRESENTS THE PRESENTATION OF THE SURVEILLANCE VIDEOTAPE AS "NEWLY DISCOVERED EVIDENCE" AND APPARENTLY MISAPPREHENDS THE TIMING OF SUBMISSION OF A COUNTER-VIDEOTAPE BY THE APPELLANTS.

The Court's opinion erroneously states, "The defendant's surveillance video tape was presented to the circuit court as "newly-discovered evidence" of misrepresentation by the plaintiff. . . . " [Opinion at 8]. To the contrary, the videotape was never presented as newly-discovered evidence under R. Civ. P. 60(b)(2), a point

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[10] *See also Anderson v. Bessemer City*, 470 U.S. 564, 575, 105 S. Ct. 1504, 1512, 84 L. Ed. 2d 518 (1985) ("when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.").

made explicit throughout the proceedings, including before this Court. Rather, the videotape was presented solely under R. Civ. P. 60(b)(3) as evidence of fraud, misrepresentation, or other misconduct of an adverse party. A hearing on such motion was properly noticed and the appellants participated in such hearing without objection and without offering any counter-evidence. In this Court's opinion, it states, "we are also troubled by the circuit court's refusal to hold an evidentiary hearing to examine the plaintiff's evidence to refute the defendant's allegations." [Opinion at 8]. This statement, however, fails to recognize that Judge Sanders rendered his decision to award a new trial ***after he had already conducted a hearing on the motion for new trial without objection and without any request for the presentation of evidence*** and ***before the appellants had made any request to present evidence***. The appellee is frankly perplexed as how Judge Sanders supposedly erred by failing to give the appellants two, three, or four bites at the apple. In *Moreland v. Suttmiller*, 183 W. Va. 621, 626, 397 S.E.2d 910, 915 (1990), this Court held, "We find that the court committed no error by failing to hold an evidentiary hearing pursuant to W.Va.R.Civ.P. 60(b). In making this finding, we observe from the record that the court gave the Morelands sufficient opportunity to be heard before the decision was made to enforce the settlement agreements." Likewise, in the instant case, as the appellants were given sufficient opportunity to be heard before Judge Sanders' decision, there was no error in acceding to their belated request for an evidentiary hearing. If this Court is concerned about the failure to conduct an evidentiary hearing despite the appellants' dilatoriness, the appropriate

remedy would have been a remand for such hearing, rather than reinstating the judgment.[11]

D. IS COURT ERRED BY REFUSING TO APPLY THE STATUTORY CAP ON NON-ECONOMIC DAMAGES WHERE THE VERDICT FORM CLEARLY DISTINGUISHED BETWEEN "SPECIAL DAMAGES" AND "GENERAL DAMAGES" AND THE JURY RETURNED A VERDICT OF "GENERAL DAMAGES" IN EXCESS OF THE STATUTORY CAP.

This Court's opinion states, "Both the jury instruction and the jury's verdict form merged 'special," economic-type damages, such as lost future wages and employment benefits and future medical expenses, with 'general,' non-economic-type damages, such as past and future pain and suffering and loss of capacity to enjoy life." [Opinion at 15]. As correctly stated in footnote seven of the opinion, however, the verdict form clearly distinguished between "SPECIAL DAMAGES," for which the jury returned a verdict of $88,129.59, and "GENERAL DAMAGES," for which the jury returned a verdict of $2,169,431.11. [Opinion at 13-14 n.7]. Contrary to the Court's opinion, the

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[11] *See West Virginia Dept. of Health and Human Resources v. Hess*, 189 W. Va. 357, 358, 432 S.E.2d 27, 28 (1993) ("Moreover, because the Department did not have a full and fair opportunity to rebut the ground on which the grievance was sustained, we reverse and remand the case for an evidentiary hearing on whether the Department discriminated against the appellees by showing 'favoritism' to another employee of the Department.").

verdict form obviously did distinguish between "SPECIAL DAMAGES" and "GENERAL DAMAGES." Accordingly, this Court's citation of *Grove v. Myers*, 181 W. Va. 342, 348, 382 S.E.2d 536, 542 (1989), where it stated, "When this procedure is not followed and only a general verdict is returned, the plaintiff is entitled to prejudgment interest on the entire amount of the general verdict containing special or liquidated damages in unspecified amounts," is completely inapposite. Moreover, this Court's statement that lost future earnings can be proven solely by the plaintiff's own testimony is clearly contrary to existing law.[12] Finally, it is clear that impairment of earning capacity is subjected to the same standards of proof.[13] Consequently, there was no proper evidentiary

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[12] *See Stone v. United Engineering*, 197 W. Va. 347, 364, 475 S.E.2d 439, 456 (1996) ("Plaintiff was required to establish through expert testimony, not only the existence of a permanent injury, but also, the injury's 'vocational effect on the plaintiff's work capacity, and an economic calculation of the monetary loss over the plaintiff's work-life expectancy reduced to a present day value.' Syl. pt. 2, in part, *Liston v. University of West Virginia*, 190 W. Va. 410, 438 S.E.2d 590 (1993). Plaintiff's testimony that he could expect to find employment six months following completion of his degree in December of 1995 clearly did not meet this requirement. The jury's award of future lost wages was, therefore, based upon mere speculation and conjecture and cannot be sustained. Syl. pt. 5, *Sisler, supra.*").

[13] *See Liston v. University of West Virginia Board of Trustees*, 190 W. Va. 410, 413, 438 S.E.2d 590, 593 (1993) ("In *Adkins v. Foster*, 187 W. Va. 730, 733, 421 S.E.2d 271, 274 (1992), we set forth the necessary elements of proof regarding future damages, including the loss of future earning capacity, when we stated: '[I]mpairment of earning capacity is a proper element of recovery when two elements have been proven: permanent injury and reasonable degree of certainty of the damages.'

basis for the award of any special damages component in the jury's award of general damages in excess of $1 million and the appellee has been wrongfully deprived of the benefit of the statutory cap.

IV. CONCLUSION

The majority opinion fails to even address the issue which has been the focus of each and every pleading filed before this Court, whether or not it has subject matter jurisdiction to hear this matter. It is overwhelmingly clear that the Court does not as (1) the petition for appeal was filed more than four months after entry of the final judgment and (2) the appeal statute was amended prior to entry of judgment to eliminate the right to appeal new trial orders. As this Court rendered a decision without subject matter jurisdiction, the appellee's federal and state constitutional due process rights have been violated. Equally alarming, this Court ignored its well-established precedent and disregarded a trial court's firsthand observations of appearance, demeanor, and credibility of witnesses. As noted by the United States Supreme Court, once a trial court renders a decision predicated upon credibility determinations not contradicted by extrinsic evidence of record, an appellate court should proceed no further. Finally, this Court's affirmance of an award of "GENERAL DAMAGES" in excess of $1 million, where there was no competent evidence of any economic component of such award, is violative of the statutory cap on

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Citing Jordan v. Bero, 158 W. Va. 28, 52, 210 S.E.2d 618, 634 (1974)."

non-economic damages. Accordingly, the appellee, Aurelio Benavides, M.D., respectfully requests a rehearing in this matter.

AURELIO BENAVIDES, M.D.

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CERTIFICATE OF SERVICE

I certify that on the 12th day of December, 1999, I served the foregoing ***Petition for Rehearing*** upon counsel of record by depositing true copies thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 26355

KENT A. GERVER and BILLIE JO GERVER,
Plaintiffs Below, Appellants

vs.

AURELIO BENAVIDES, M.D.,
Defendant Below, Appellee

Honorable David H. Sanders, Judge
Circuit Court of Berkeley County
Civil Action No. 96-C-459

BRIEF OF THE APPELLEE

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* * *

I. INTRODUCTION

The appellants, Kent and Billie Jo Gerver [Gervers], have appealed from an order awarding a new trial. The appellee, Aurelio Benavides, M.D. [Dr. Benavides], respectfully submits that there are several reasons the appeal should be dismissed as improvidently awarded and/or the order awarding a new trial should be affirmed.

First, this Court lacks jurisdiction to entertain a petition for appeal from an order awarding a new trial because such order does not constitute a "final judgment." The order granting a new trial was entered on June 22, 1998. The Legislature amended W. Va. Code § 58-5-4, effective June 14, 1998, to provide, "A party to a civil action may appeal to the supreme court of appeals from a ***final judgment*** of any circuit court or from an order of any circuit court constituting a final judgment as to one or more but fewer than all claims or parties upon an express determination by the circuit court that there is no just reason for delay and upon an express direction for the entry of judgment as to such claims or parties." [Emphasis supplied]. The former statute specifically permitted an appeal from the award of a "new trial," which has been deleted. An order awarding a new trial does not constitute a "final judgment," as it does not resolve all issues as to all parties. Accordingly, a petition for appeal from the award of a new trial is no longer appealable under W. Va. Code § 58-5-1.

Second, an order denying a motion to alter or amend the order granting a new trial was entered on September 16, 1998. Under W. Va. Code § 58-5-4, which provides, in

relevant part, that, "No petition shall be presented for an appeal from any judgment rendered more than four months before such petition is filed with the clerk of the court where the judgment being appealed was entered," the Gervers had until January 16, 1999, to file their petition for appeal, but did not file a petition for appeal until April 27, 1999. Therefore, the Gervers' petition for appeal is untimely. After entry of the order denying the motion to alter or amend on September 16, 1998, the Gervers simply filed another motion to alter or amend the order denying the motion to alter or amend on September 28, 1998. On December 28, 1998, an order was entered denying the motion to alter or amend the order denying the motion to alter or amend. It is from that order that the Gervers have appealed. Unfortunately, their second motion to alter or amend was untimely, having been filed more than 10 days after the ***judgment*** had already been rendered, and their petition for appeal precluded because it was not filed prior to January 16, 1999.

Third, the presiding judge, the Honorable David H. Sanders, Judge of the Circuit Court of Berkeley County, did not abuse his discretion in awarding a new trial based upon fraud. Judge Sanders observed the demeanor of the petitioner, Kent Gerver, at trial as he testified regarding his inability to function as a normal person. He further observed the demeanor of the petitioner, Kent Gerver, on surveillance videotape following the trial, when the petitioner, Kent Gerver, appeared to perform feats that would be superhuman in light of his trial testimony and demeanor. Judge Sanders then concluded, "this amounts to proof of misrepresentation and sufficiently calls into

question the credibility of the Plaintiffs as to merit a new trial in the interest of justice."

* * *

III. DISCUSSION OF LAW

A. AN ORDER GRANTING A NEW TRIAL IS NO LONGER SUBJECT TO APPELLATE REVIEW.

On March 14, 1998, the Legislature amended W. Va. Code § 58-5-1, effective on June 17, 1998, to provide, in relevant part, as follows:

> A party to a civil action may appeal to the supreme court of appeals from a final judgment of any circuit court or from an order of any circuit court constituting a ***final judgment*** as to one or more but fewer than all claims or parties upon an express determination by the circuit court that there is no just reason for delay and upon an express direction for the entry of judgment as to such claims or parties.

[Emphasis supplied]. Formerly, W. Va. Code § 58-5-1 provided, in relevant part, that:

> A party to a controversy in any circuit court may obtain from the supreme court of appeals . . . an appeal from . . . (i) In any civil case where there is an order granting a new trial . . . and in such cases ***an appeal may be taken from the order without waiting for the new trial . . . to be had***. . . .

[Emphasis supplied]. The significance of this statutory change is reflected in previous decisions of this Court

recognizing (1) the interlocutory nature of an order granting a new trial and (2) the non-appealability of an order granting a new trial in the absence of statutory authority.

In *Gonzalez v. Conley*, 199 W. Va. 288, 292, 484 S.E.2d 171, 175 (1997), this Court observed, "[W]hen a trial judge vacates a jury verdict and grants a new trial, he or she does not enter a final judgment." Rather, as the Court further noted, "Although an order granting a new trial is not a final order, W. Va. Code, 58-5-1(i) [1925] permits appeals from an interlocutory order granting a new trial. *See also Coleman v. Sopher*, 194 W. Va. 90, 95, 459 S.E.2d 367, 372 (1995). *Id.* at 292 n. 2, 484 S.E.2d at 175 n. 2. *See also State ex rel. Crouser v. Mercer*, 141 W. Va. 691, 700, 92 S.E.2d 745, 751 (1956).

In the absence of statutory authority, this Court is without jurisdiction to entertain an appeal from the award of an interlocutory order awarding a new trial. In Syllabus Point 1 of *James B. v. Carolyn M.*, 193 W. Va. 289, 456 S.E.2d 16 (1995), this Court held:

> A court of limited appellate jurisdiction is obliged to examine its own power to hear a particular case. This Court's jurisdictional authority is either endowed by the West Virginia Constitution or conferred by the West Virginia Legislature. Therefore, this Court has a responsibility *sua sponte* to examine the basis of its own jurisdiction.

At present, neither the West Virginia Constitution nor any West Virginia statute confers upon this Court the jurisdiction to hear appeals of any interlocutory orders, including orders granting a new trial. Consequently, this Court is without jurisdiction to entertain the Gervers' appeal.

The federal appeal statute, 28 U.S.C. § 1291, provides, in relevant part, that, "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court." It is well-recognized that, under this statute, federal courts of appeal lack appellate jurisdiction in cases involving the award of a new trial. *See, e.g., Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34, 101 S. Ct. 188, 66 L. Ed. 2d 193 (1980); *Eberhardt v. Integrated Design Construction, Inc.*, 1999 WL 62171 at 7 (4th Cir. 1999); *Latino v. Kaizer*, 58 F.3d 310 (7th Cir. 1995); *Arenson v. Southern University Law Center*, 963 F.2d 88 (5th Cir. 1992). In this regard, it has been noted:

> An order granting a new trial usually is not appealable, since it is purely interlocutory and is not such a final judgment as the statute makes appealable. . . .
>
> A distinction must be observed, however, between appealability and reviewability. An order granting a new trial is not appealable, but it is certainly reviewable. On appeal from the final judgment following the second trial, the appellant may claim error in the grant of the new trial. If the appellate court agrees, it will reinstate the verdict reached at the first trial.

11 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2818 (1999). [Footnotes omitted]. Accordingly, the appellee respectfully submits that this Court is without jurisdiction to entertain the Gervers' petition for appeal,

but can subject the new trial order to appellate review only after the entry of a "final judgment" following the retrial.

B. ASSUMING THIS COURT HAS JURISDICTION TO ENTERTAIN AN APPEAL FROM THE AWARD OF A NEW TRIAL, THE APPEAL IS NEVERTHELESS UNTIMELY AS IT WAS NOT FILED WITHIN FOUR MONTHS OF THE ENTRY OF AN ORDER DENYING THE GERVERS' MOTION TO ALTER OR AMEND.

W. Va. Code § 58-5-4 provides, in relevant part, that "No petition shall be presented for an appeal from any judgment rendered more than four months before such petition is filed with the clerk of the court where the judgment being appealed was entered. . . . " In this case, there is no "judgment," but even assuming the order granting the new trial constitutes a "judgment" for purposes of W. Va. Code § 58-5-4, the petition for appeal was not timely filed. The order awarding a new trial in this case was entered on June 22, 1998. On July 2, 1998, the Gervers filed a "Motion to Alter or Amend Judgment." An order was entered denying the Gervers' motion to alter or amend on September 16, 1998. Instead of appealing, however, the Gervers filed another "Motion to Alter or Amend Judgment Order" on September 28, 1998. On December 28, 1998, Judge Sanders entered yet another order denying the Gervers' second motion to alter or amend, stating as follows:

> Upon careful consideration whereof, the Court is of opinion to and doth hereby deny the subject motion for the reasons that (1) the motion

> was not filed within 10 days of entry of the judgment order entered on September 16, 1998, and is therefore untimely under R. Civ. P. 59(e); (2) even if timely filed under R. Civ. P. 59(e), the motion does not raise grounds which could not have been timely raised in the original motion to alter or amend; (3) even if considered as a motion under R. Civ. P. 60(b), it does not allege any grounds which could be fairly construed under R. Civ. P. 60(b)(1) - (5), and this Court finds no equitable justification for setting aside the new trial order; (6) the plaintiffs had adequate opportunities to present whatever evidence they desired in opposition to the defendant's motion for new trial both during the pendency of such motion and in conjunction with their original motion to alter or amend; and (5) this Court's review of the evidence submitted by the plaintiffs with regard to their second motion to alter or amend reveals no justification for conducting an evidentiary hearing or setting aside the order awarding a new trial for the multiple reasons set forth therein.

[Order at 1-2].

R. Civ. P. 59(e) provides, "Any motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment." "The practical effect of such a motion," this Court recently noted in *Wickland v. American Travellers Life Ins. Co.*, 1998 WL 918217 at 4 (W. Va. Nov. 4, 1998), "is to enlarge the time within which an appeal must be filed as to those matters which are the subject of the motion." As this Court held in Syllabus Point 7 of *James M.B. v. Carolyn M., supra* ("A motion for reconsideration filed [pursuant to R. Civ. P. 59(e)] within ten days of judgment being entered suspends the finality

of the judgment and makes the judgment unripe for appeal. When the time for appeal is so extended, its full length begins to run ***from the date of entry of the order disposing of the motion.***" [Emphasis supplied]. *See also Lieving v. Hadley*, 188 W. Va. 197, 200-01 n. 3, 423 S.E.2d 600, 603-04 n. 3 (1992) (" ' The full time for filing a petition for appeal commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: Granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under rule 52(b) to amend or make additional findings of fact whether or not an alteration of the judgment would be required if the motion were granted; ***or granting or denying a motion under Rule 59 to alter or amend the judgment***; or granting or denying a motion for a new trial under Rule 59. [Emphasis added].' "), *quoting* R. Civ. P. 72.

In this case, the "judgment," if one was entered, was the order granting a new trial. The Gervers then filed a R. Civ. P. 59 motion within 10 days of the entry of this "judgment." Eventually, the trial court entered an order denying the R. Civ. P. 59 motion. Under this Court's decisions, the "full length" of the four-month appeal period commenced "to run from the date of entry of the order disposing of the motion." The subsequent R. Civ. P. 59 motion was untimely and the trial court recognized that it was without jurisdiction to entertain such motion. Obviously, a litigant cannot file R. Civ. P. 59 motion after motion in order to extend the appeal period indefinitely. In *Blankenship v. Estep*, 201 W. Va. 261, 264, 496 S.E.2d 211, 214 (1997) (per curiam), this Court held that a trial court was without jurisdiction to entertain a R. Civ. P. 59

motion not filed within 10 days of entry of judgment. Likewise, in the instant case, the trial court was without jurisdiction to entertain the Gervers' R. Civ. P. 59 motion that was filed more than 10 days of entry of judgment.[3]

C. ASSUMING THIS COURT HAS JURISDICTION TO ENTERTAIN AN APPEAL FROM THE AWARD OF A NEW TRIAL AND ASSUMING THE PETITION FOR APPEAL WAS NOT UNTIMELY, THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN AWARDING A NEW TRIAL BASED UPON FRAUD AND MISREPRESENTATION.

This Court has granted substantial discretion to trial judges in ruling on motions for a new trial. In Syllabus Point 1 of *In re: State of West Virginia Public Building Asbestos Litigation*, 193 W. Va. 119, 454 S.E.2d 413 (1994), for example, this Court held:

> " 'It takes a stronger case in an appellate court to reverse a judgment awarding a new trial than one denying it and giving judgment against the party claiming to have been aggrieved.' Point 1, Syllabus, *The Star Piano Co. v. Brockmeyer*, 78 W.

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[3] The Gervers' second motion was predicated solely upon R. Civ. P. 59(e). First, it was captioned, "Plaintiff's [sic] Motion to Alter or Amend Judgment Order." Second, it expressly stated, "Kent and Billie Jo Gerver move this Court pursuant to West Virginia Rule of Civil Procedure 59(e) for entry of an order vacating or amending the Order Denying [the Plaintiffs'] Motion to Alter or Amend entered by the Court on September 16, 1998." Finally, it never referenced R. Civ. P. 60(b) nor did it state any grounds for relief under R. Civ. P. 60(b).

> Va. 780 [, 90 S.E. 338 (1916)]." Syl. pt. 2, *Young v. Duffield*, 152 W. Va. 283, 162 S.E.2d 285 (1968).

Similarly, in Syllabus Point 2 of *Public Building Asbestos Litigation*, the Court held:

> "An appellate court is more disposed to affirm the action of a trial court in setting aside a verdict and granting a new trial than when such action results in a final judgment denying a new trial." Syl. pt. 4, *Young v. Duffield*, 152 W. Va. 283, 162 S.E.2d 285 (1968).

See also Syl. pt. 1, *Summers v. Martin*, 199 W. Va. 565, 488 S.E.2d 305 (1997). This Court held in Syllabus Point 3 of *Public Building Asbestos Litigation* that:

> A motion for new trial is governed by a different standard than a motion for a directed verdict. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, ***is based on false evidence or will result in a miscarriage of justice***, the trial judge may set aside the verdict, even if supported by substantial evidence. A trial judge's decision to award a new trial is ***not subject to appellate review unless the trial judge abuses his or her discretion.***

[Emphasis supplied]. *See also* Syl. pt. 2, *Summers v. Martin*, *supra*; *Maples v. West Virginia Department of Commerce*, 197 W. Va. 318, 325, 475 S.E.2d 410, 417 (1996) (" 'Ultimately the motion invokes the sound discretion of the trial court,

and appellate review of its ruling is quite limited.' . . . (*quoting* 11 Charles Alan Wright and Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure § 2803 at 32-33 (1973)."); Syl. pt. 1, *Toothman v. Brescoach*, 195 W. Va. 409, 465 S.E.2d 866 (1995). In addition to having a superior opportunity to see and hear the evidence presented to the jury, the trial judge is in a much better position to make credibility determinations and to decide the prejudicial effect of trial error. As the Court noted in *Public Building Asbestos Litigation*:

> After all, "[t]he trial judge was on the spot and is better able than an appellate court to decide whether the error affected the substantial rights of the parties." *Id.* at § 2818 at 119-20. Similarly, this Court has recognized when addressing the trial judge's authority to award a new trial that "[t]he trial court has opportunities to observe many things in the course of a trial which the printed record presented to an appellate court does not disclose[.]" *Browning v. Monongahela Transport Co.*, 126 W. Va. 195, 203, 27 S.E.2d 481, 485 (1943). The United States Court of Appeals of the Fourth Circuit has best explained the standard of review:
>
> > A motion for a new trial is governed by a different standard from a directed verdict motion. . . . Under Rule 59 of the Federal Rules of Civil Procedure, a trial judge may weigh the evidence and consider the credibility of the witnesses and, if he finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, he must set aside the verdict, even if supported by substantial evidence, and grant a new trial.

> *Poynter v. Ratcliff*, 874 F.2d 219, 223 (4th Cir. 1989) (citations omitted).

Id. at 125-26, 454 S.E.2d at 419-20.

"[O]n such related matters as the improper admission of evidence . . . [and] false testimony," it has been observed, "there is considerable deference by the appellate court to the action of the trial court. The trial judge was on the spot and is better able than an appellate court to decide whether the error affected the substantial rights of the parties." 11 Wright & Miller, Federal Practice and Procedure § 2818 (1999). [Footnotes omitted]. As the court stated in *Antevski v. Volkswagenwerk Artiensgesellschaft*, 4 F.3d 537, 540-41 (7th Cir. 1993), where the plaintiffs alleged that a post-trial statement by a witness demonstrated that the witness had committed perjury:

> Our more deferential review is particularly appropriate in a situation such as this one, in which the decision to grant a new trial turns on a credibility determination. Without the opportunity to view Cifaldi's demeanor, we lack any reliable basis for overturning the district court's decision.

Likewise, in the instant case, without an opportunity to view the trial demeanor of the Gervers, this Court lacks any reliable basis for overturning Judge Sanders' decision to award a new trial based upon his first-hand observations of such demeanor.

A review of the videotape alone, the appellee respectfully submits, would not afford this Court a sufficient basis to set aside Judge Sanders' new trial order, because the videotape is only half of the equation. The other half of the equation, i.e., Kent Gerver's trial demeanor, was

observed only by Judge Sanders and is not available for this Court's appellate review. Kent Gerver's facial expressions, body movement, body language, and other verbal and non-verbal means of expressing his constant, agonizing pain to the jury appears nowhere in the record. Whether he required physical assistance just to move about the courtroom, likewise, would not appear in the record. One might observe the videotape and conclude that Kent Gerver still displays some impairment. Without an opportunity to observe his trial demeanor, however, this Court has nothing against which to compare his demeanor on the videotape. Surely, if a plaintiff was carried to the witness stand on a stretcher wearing a cervical collar, which would not necessarily appear in the transcript, and shortly thereafter was observed operating a riding lawnmower, a string trimmer, and carrying lawn furniture, it would be within a trial judge's discretion to set aside a jury's verdict and award a new trial.

This Court has long recognized the unique ability of a trial judge to observe the demeanor of the witnesses, while an appellate court is limited to merely a dry, lifeless record. Moreover, this Court has recognized the overwhelming deference afforded a trial court in awarding a new trial as a result of the trial court's unique position. In *Pallotto v. Cherry River Paper Co.*, 106 W.Va. 60, 144 S.E. 720, 721-3 (1928) this Court noted:

> By granting a new trial for such reasons, a plaintiff is not denied right of recovery. And whether the error is such as to demand a new trial addresses itself peculiarly to the trial court. Having found error –

> 'he may invoke and use, in addition thereto, his general knowledge of the case, ***obtained by observation of the parties, witnesses and jurors and their appearances, demeanor and conduct throughout the trial***. His judgment based upon the error and such knowledge is entitled to a ***high degree of respect***, in the appellate court, and the judgment or ruling will be sustained in cases and under circumstances not justifying award of a new trial, by the appellate court *whose knowledge of the case is derived from the printed record alone.' Levine v. Mantgell*, 90 W. Va. 166, 175, 111 S.E. 501, 504.
>
> The appellate court has a dry, lifeless record of the trial, while the lower court has a live record, if it may be so termed. We cannot say that the action of the court was clearly erroneous, and this rule precludes reversal.

[Emphasis supplied]. More recently, this Court has recognized its inability to judge demeanor and credibility on appeal in the context of divorce proceedings. In *Michael D.C. v. Wanda L.C.*, 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997), this Court noted that "[a] reviewing court cannot assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations." In so holding, this Court noted the unique role of the family law master in making such assessments, as well as the deference such role requires. The *Michael D.C.* Court quoted, with approval, *Stephen L. H. v. Sherry L.H.*, 195 W. Va. 384, 395-6, 465 S.E.2d 841, 852-3 (1995) for the proposition that:

> ***There are many critical aspects of an evidentiary hearing which cannot be reduced to writing and placed in a record, e.g., the demeanor of witnesses***. These factors may affect the mind of a trier of fact in forming an opinion as to the weight of the evidence and character and credibility of the witnesses. Thus, the importance of these factors should not be ignored by a reviewing court. Given a family law master's intimate familiarity with the proceedings, the family law master is in the best position to weigh the evidence and assess credibility in making the ultimate ruling on disputed facts.

[Emphasis supplied].

Other courts have similarly recognized the limitations placed upon the cold written record as opposed to the live courtroom experience. In *Johansesn* [sic] *v. Combustion Engineering, Inc.*, 1999 WL 178538 (11th Cir. April 1, 1999) (*quoting Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 474, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985), for example, the Eleventh Circuit Court of Appeals recently noted that "[w]hen findings of fact are based on determinations about witnesses' credibility, the deference accorded the trial judge is even more significant; for ***only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.***' " [Emphasis supplied]. *See also United States v. O'Keefe*, 128 F.3d 885, 893 (5th Cir. 1997).

R. Civ. P. 59(a) provides, "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore

been granted in actions at law. . . . " R. Civ. P. 60(b)(3) provides, "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." Judge Sanders relied upon both of these rules in awarding a new trial based upon fraud and misrepresentation.

The decision regarding the award of a new trial based upon fraud and/or misrepresentation was clearly within Judge Sanders' discretion. In this regard, it has been noted:

> Rule 60(b)(3) provides the court with discretion to grant a motion to relieve a party from a final judgment, order, or proceedings on the grounds of fraud, misrepresentation, or other misconduct of an adverse party. Under this Rule, both intentional and unintentional misrepresentations and failures to disclose are sufficient basis for relief.

12 Moore's Federal Practice 3d § 60.43[1][a] at 60-128 (1998). [Footnotes omitted]. *See also Ross v. Ross*, 187 W. Va. 68, 70, 415 S.E.2d 614, 616 (1992); *Savas v. Savas*, 181 W. Va. 316, 319, 382 S.E.2d 510, 513 (1989).

It is well-recognized that the presentation of willfully false testimony may warrant a relief from judgment. *See Diaz v. Methodist Hospital*, 46 F.3d 492, 497 (5th Cir. 1997) ("If unequivocal evidence establishes that a party willfully perjured himself, and thereby prevented the opposition from fully and fairly presenting its case, use of Rule 60(b)(3) to grant the innocent party a new trial would be a proper response."); *Harre v. A.H. Robins Co.*, 750 F.2d

1501, 1504 (11th Cir. 1985) (defense expert's conflicting testimony in succeeding trials about his participation in product safety tests merited district court inquiry into whether a new trial was appropriate). Moreover, the critical issue is not whether fraud and/or misrepresentation affected the outcome, but rather whether it adversely affected the fundamental fairness of the trial. *See* 12 MOORE'S FEDERAL PRACTICE 3D § 60.43[1][d], at 60-133 (1998) ("Rule 60(b)(3) is aimed at providing relief for judgments that were unfairly obtained, not those that are factually inaccurate.') (footnote omitted). *See also Anderson v. Cryovac, Inc.*, 862 F.2d 910. 924 n. 10 (1st Cir. 1988) (it is wrong for the guilty party to retain a judgment wrongfully procured and moving party need not show anything more than the judgment was wrongfully procured); *Johnson v. Offshore Express, Inc.*, 845 F.2d 1347, 1358 (5th cir. 1988) (it is unfairness in obtaining a judgment that counts, not whether the judgment is factually correct); *Lonsford v. Seefeldt*, 47 F.3d 893, 897 (7th Cir. 1995) ("A determination of whether the alleged misrepresentation altered the result is unnecessary because Rule 60(b)(3) protects the fairness of the proceedings, not necessarily the correctness of the verdict.").

There can be no question in this case that the videotape of Kent Gerver raises serious questions regarding his trial testimony and strikes at the heart of the fairness of the proceedings. As previously noted, the Court has repeatedly recognized that, "If the trial judge finds the verdict . . . is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's discretion to award a

new trial is not subject to appellate review unless the trial judge abuses his or her discretion." *Andrews v. Reynolds Memorial Hospital, Inc.*, 201 W. Va. 624, 499 S.E.2d 846 (1997); *Brooks v. Harris*, 201 W. Va. 184, 495 S.E.2d 555 (1997); Syl. pt. 1, in part, *Gum v. Dudley*, 202 W. Va. 477, 505 S.E.2d 391 (1997); Syl. pt. 1, in part, *Pauley v. Bays*, 200 W. Va. 459, 490 S.E.2d 61 (1997); Syl., in part, *Morrison v. Sharma*, 200 W. Va. 192, 488 S.E.2d 467 (1997); Syl pt. 2, in part, *Summers v. Martin, supra*; Syl. pt. 1, in part, *Witt v. Sleeth*, 198 W. Va. 398, 481 S.E.2d 189 (1996); *Johnson v. Garlow*, 197 W. Va. 674, 678 n. 4, 478 S.E.2d 347, 351 n. 4 (1996); *Payne v. Gundy*, 196 W. Va. 82, 85, 468 S.E.2d 335, 338 (1996); Syl. pt. 1, in part, *Toothman v. Brescoach, supra*; *Coleman v. Sopher, supra* at 96, 459 S.E.2d at 373; Syl. pt. 2, in part, *Maynard v. Adkins*, 193 W. Va. 456, 457 S.E.2d 133 (1995).

Other courts have used videotape evidence to support the award of a new trial. In *Register Propane Gas Co., Inc. v. Whatley*, 688 So. 2d 225, 228-29 (Ala. 1997), the Alabama Supreme Court affirmed the award of a new trial after the defendant in a wrongful death case discovered the existence of a videotape, that depicted the storage of blood in containers that could have undermined testimony from the plaintiffs' expert regarding the level of carbon monoxide in the decedents' blood, stating that:

> The logical result of the videotape evidence was thus to negate the blood samples as factors for consideration. The result of this new evidence, if believed by the jury, would posture the case as if no blood samples had been taken in the first instance. The negation of blood test evidence would leave the jury with nothing but the general circumstances surrounding the deaths and

> testimony of several witnesses, including Alabama State Medical Examiner Dennis Stilwell. . . . [W]e cannot say that the trial court abused its discretion in granting a new trial.

In *Arnold v. Owens-Illinois Libbey Glass Division*, 1987 WL 8013 at 2 (Ohio App. 1987), the court affirmed the award of a new trial based upon the trial judge's determination, after reviewing surveillance videotape, that the plaintiff had perjured herself in a material manner:

> The detectives set up a series of mock marketing ploys. As part of the various ploys, the appellant tested certain products to the extent of swinging a bat, throwing a nerf football, tossing a basketball, jumping rope, etc. Appellant was videotaped lifting and carrying various grocery items, including but not limited to cases of beer, a case of soda weighing twenty-five pounds, a fifty pound bag of dog food, a case of windshield washer fluid weighing fifty-three pounds, a case of antifreeze weighing sixty-three pounds, etc. . . . The trial court granted defendant-appellee's motion for a new trial pursuant to Civ. P. 59(A)(2), concluding that plaintiff perjured herself. The trial court ordered a new trial after viewing videotapes depicting appellant lifting and testing products. At trial under cross examination, appellant denied loading any items obtained as part of the marketing test, claimed that she could not lift such items, testified that she did not wash any car windows as part of the test, and further testified that she did not swing a baseball bat, throw a football, toss a basketball, or jump rope.

* * *

> [T]here was sufficient direct evidence of perjury to support the trial court's conclusion. The videotapes clearly showed appellant doing the very things she earlier denied doing. . . .

See also Crossett v. Babcock Industries, 1998 WL 27930 at 1 (Tenn. 1998) ("We have carefully reviewed the trial evidence, and the videotape which purports to show post-trial activities of the injured employee. The motion is certainly not frivolous. Whether or not it is credible evidence of perjury is initially for the learned trial judge to determine.").[4] In the present case, Judge Sanders appropriately determined that the jury's verdict was based

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[4] Other courts have awarded new trials based upon other post-verdict evidence of fraudulent or perjurious testimony. In *Viskase Corporation v. American National Can Co.*, 979 F. Supp. 697, 702, 704 (N.D. Ill. 1997), for example, the trial judge awarded a new trial when post-verdict evidence indicated that the plaintiff's expert witness had testified falsely at trial:

> The post-trial depositions of Jordi employees and principals establish that much of what I have quoted from Dr. Porter's testimony is false.
>
> * * *
>
> I cannot say whether if Dr. Porter had testified truthfully the outcome would have been different. It makes no difference. It might have been different and since I conclude that his testimony was materially false, ANC has satisfied its burden under Rule 60(b)(3), Fed. R. Civ. P.

[Footnote omitted].

upon fraud or misrepresentation, warranting a new trial in order to prevent a miscarriage of justice.[5]

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[5] The Gervers also complain that they were denied an evidentiary hearing on their two motions to alter or amend. With respect to R. Civ. P. 59, however, the nonmoving party's right to evidentiary development is clearly limited. In this regard, R. Civ. P. 59(c) provides, "When a motion for new trial is based upon affidavits they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation." In this case, the Gervers, as nonmoving parties, did submit an affidavit in opposition to the motion for new trial. The rule does not contemplate any further evidentiary hearing as would create the "trial within a trial" which the Rules of Civil Procedure are designed to avoid. The Gervers never requested an opportunity for further evidentiary development prior to Judge Sanders' initial decision on the motion for new trial and should be deemed to have waived any right to even argue for that relief. Moreover, Judge Sanders did consider the affidavit submitted by the Gervers in conjunction with their second motion to alter or amend, but determined that it did not merit either a further evidentiary hearing or reconsideration of his decision to award a new trial.

With respect to R. Civ. P. 60(b), it is likewise clear that the nonmoving party has no right to an evidentiary hearing. In this regard, it has been noted:

> Rule 60(b) permits a court to relieve a party of a final judgment, order, or proceeding, for any of the grounds listed in the rule, "on motion and upon such terms as a [sic] just." The express purpose of the rule was to take all of the various grounds and procedures available before the rules were adopted, and to substitute either a simple motions procedure or an independent action.

12 MOORE'S FEDERAL PRACTICE 3D § 60.21[1], at 60-48 (1998). [Footnote omitted]. Accordingly, as this Court has recognized,

* * *

"Just as the circuit court has broad discretion in resolving a new trial matter, so, too, does it enjoy discretion whether to hold an evidentiary hearing on this motion." *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 317 n. 1, 465 S.E.2d 416, 419 n. 1 (1995). Again, the Gervers had every opportunity at the hearing on the motion for new trial to present whatever evidence they desired in opposition to the motion. They even exchanged remarks with Judge Sanders on the possibility of requesting and awaiting a transcript of trial testimony, but did not choose to do so. Under these circumstances, it was not an abuse of discretion for Judge Sanders to deny the Gervers' belated request for an evidentiary hearing ***after*** a new trial had already been awarded.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

KENT A. GERVER and BILLIE JO GERVER, Plaintiffs Below, Appellants

vs.) No. 26355

AURELIO BENAVIDES, M.D., Defendant Below, Appellee

(Filed Jul. 6, 1999)

MOTION TO DISMISS

Comes now the appellee, Aurelio Benavides, M.D., by Steptoe & Johnson, William Galeota, Esq., P. Gregory Haddad, Esq., and Ancil G. Ramey, Esq., his attorneys, and moves this Court, pursuant to W. Va. Code § 58-5-1 and W. Va. R. App. P. 17, for a dismissal of the above-captioned appeal, as this Court is without jurisdiction to hear and decide an appeal from anything other than a final judgment, including an order setting aside a verdict and awarding a new trial, which does not constitute a final judgment. Because this matter involves an appeal from an order entered on June 22, 1998, awarding a new trial, the appellee respectfully prays for a dismissal of the above-referenced proceeding.

On March 14, 1998, the Legislature amended W. Va. Code § 58-5-1, effective on June 17, 1998, to provide, in relevant part, as follows:

> A party to a civil action may appeal to the supreme court of appeals from a final judgment of any circuit court or from an order of any circuit court constituting a ***final judgment*** as to

> one or more but fewer than all claims or parties upon an express determination by the circuit court that there is no just reason for delay and upon an express direction for the entry of judgment as to such claims or parties.

[Emphasis supplied]. Formerly, W. Va. Code § 58-5-1 provided, in relevant part, that:

> A party to a controversy in any circuit court may obtain from the supreme court of appeals . . . an appeal from . . . (i) In any civil case where there is an order granting a new trial . . . and in such cases ***an appeal may be taken from the order without waiting for the new trial . . . to be had*** . . . .

[Emphasis supplied].

The significance of this statutory change is reflected in previous decisions of this Court recognizing (1) the interlocutory nature of an order granting a new trial and (2) the non-appealability of an order granting a new trial in the absence of statutory authority. In *Gonzalez v. Conley*, 199 W. Va. 288, 292, 484 S.E.2d 171, 175 (1997), for example, this Court observed:

> [W]hen a trial judge vacates a jury verdict and grants a new trial, he or she does not enter a final judgment.

Rather, as the Court further noted:

> Although an order granting a new trial is not a final order, W. Va. Code, 58-5-1(i) [1925] permits appeals from an interlocutory order granting a new trial. *See also Coleman v. Sopher*, 194 W. Va. 90, 95, 459 S.E.2d 367, 372 (1995).

Id. at 292 n. 2, 484 S.E.2d at 175 n. 2. *See also State ex rel. Crouser v. Mercer*, 141 W. Va. 691, 700, 92 S.E.2d 745, 751 (1956).

In the absence of statutory authority, this Court is without jurisdiction to entertain an appeal from the award of an interlocutory order awarding a new trial. In Syllabus Point 1 of *James B. v. Carolyn M.*, 193 W. Va. 289, 456 S.E.2d 16 (1995), this Court held:

> A court of limited appellate jurisdiction is obliged to examine its own power to hear a particular case. This Court's jurisdictional authority is either endowed by the West Virginia Constitution or conferred by the West Virginia Legislature. Therefore, this Court has a responsibility *sua sponte* to examine the basis of its own jurisdiction.

At present, neither the West Virginia Constitution nor any West Virginia statute confers upon this Court the jurisdiction to hear appeals of any interlocutory orders, including orders granting a new trial. Consequently, this Court is without jurisdiction to entertain the Gervers' appeal.

The federal appeal statute, 28 U.S.C. § 1291, provides, in relevant part, that, "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court." It is well-recognized that, under this statute, federal courts of appeal lack appellate jurisdiction in cases involving the award of a new trial. *See,*

e.g., Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34, 101 S. Ct. 188, 66 L. Ed. 2d 193 (1980); *Eberhardt v. Integrated Design Construction, Inc.*, 1999 WL 62171 at 7 (4th Cir. 1999); *Latino v. Kaizer*, 58 F.3d 310 (7th Cir. 1995); *Arenson v. Southern University Law Center*, 963 F.2d 88 (5th Cir. 1992). In this regard, it has been noted:

> An order granting a new trial usually is not appealable, since it is purely interlocutory and is not such a final judgment as the statute makes appealable. . . .
>
> A distinction must be observed, however, between appealability and reviewability. An order granting a new trial is not appealable, but it is certainly reviewable. On appeal from the final judgment following the second trial, the appellant may claim error in the grant of the new trial. If the appellate court agrees, it will reinstate the verdict reached at the first trial.

11 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2818 (1999). [Footnotes omitted].

Accordingly, unless this Court intends to adopt a rule contrary to all of the federal courts of appeal that have addressed the issue under a nearly identical statute, the appellee respectfully submits that this Court is without jurisdiction to entertain the Gervers' petition for appeal, but can subject the new trial order to appellate review only after the entry of a "final judgment" following the retrial. The appellee submits that it is unfair to subject him to the delay and expense associated with full appellate review only to result in the eventual dismissal of the appeal by this Court. The appellee desires an opportunity

to a prompt trial on the merits without the error associated with the initial trial. To allow the appeal to continue may cause a delay of an additional year in the retrial of the matter.

WHEREFORE, the appellee, Aurelio Benavides, M.D., respectfully requests the entry of an order dismissing the above-captioned appeal.

AURELIO BENAVIDES, M.D.

By Counsel

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CERTIFICATE OF SERVICE

I certify that on the 6th day of July, 1999, I served the foregoing "Motion to Dismiss" upon counsel of record by depositing true copies thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

D. Michael Burke, Esq.
Burke & Schultz
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Barry J. Nace, Esq.
Paulson, Nace & Norwind
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Washington, D.C. 20036

/s/ Ancil G. Ramey

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th day of July, 1999, the following order was made and entered:

Kent A. Gerver and Billie Jo
Gerver, husband and wife,
Plaintiffs Below, Appellants

vs.) No. 26355

Aurelio Benavides, M. D., Defendant
Below, Appellee

On a former day, to-wit, July 6, 1999, came the appellee, Aurelio Benavides, M. D., by Steptoe & Johnson, William E. Galeota, P. Gregory Haddad and Ancil G. Ramey, his attorneys, and presented to the Court his motion in writing to dismiss the above-captioned proceeding for the reasons stated therein. Thereafter, on the 14th day of July, 1999, came the appellants, Kent A. Gerver and Billie Jo Gerver, husband and wife, by Burke & Schultz, and D. Michael Burke, and Paulson & Nace, and Barry J. Nace, their attorneys, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said motion to dismiss.

A True Copy

Attest: /s/ Deborah L. McHenry
Clerk, Supreme Court of Appeals